

MATERIALS ON LAW, COPYRIGHT

AND JURISPRUDENCE.

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# Materials on Law, Copyright and Jurisprudence

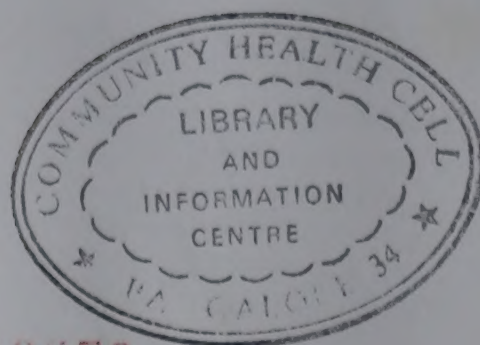
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Compiled by Prof. A Mohanram

**Kuvempu University**

**Directorate of Distance Education**



10570

# RESEARCH METHODOLOGY\*

J. S. Patil\*\*

## Introduction

"Very few really seek knowledge in this world. Mortal or immortal, few really ask. On the contrary, they try to wring from the unknown the answers they have already shaped in their own minds – justification, explanations, forms of consolation without which they can't go on. To really ask is to open the door to the whirlwind. The answer may annihilate the question and the questioner."<sup>1</sup> The student with a career interest must acquire the research tools which he will later need in holding his job, and he must embark upon an intensive training program for that purpose. As he moves upwards through the various jobs, he will often be faced with the problem of evaluating reports. Knowledge of research is useful in that situation. Even layman needs these skills in making progress in his pursuits. Wise decisions about current events are difficult to make unless he can judge the truth of published or other reports especially in the e-mode.

*Sathyameva Jayathe* or "let the truth prevail" is the kernel of every science, art, philosophy and civilization. Every research activity shall aim at it. Let the human civilization rest upon truth. However, it is necessary to appreciate the limitations of truth in social milieu. Sometimes truth may not be in consonance with the accepted mores of life. Justice and social values are to be emboldened into the truth value of every phenomenon. Hence the basic objective of any research is to get at the truth of the matter; such truth which is good and just for the society. Every science should reflect its philosophy; otherwise it may instead of being useful become dangerous to the society. Any increasing emphasis on research method in any field of learning should not lose sight of these basic factors. Legal research is not exempt from these aspects. In an era of ever increasing frontiers of law and legal institutions, a systematic approach with well evolved research methods will help in making law and legal institutions socially relevant and effective.

## Project Process: Science – Values Interface

A project has to be based on scientific process. It should be essentially a reflective thought process than a mere scientific process. It is better to understand what is science and scientific process, conceptualization, the relationship between science, arts and morality. A study of relationship between theory and facts, values and science is also worthwhile. All these understandings will put the project holder or the researcher in a good stead to carry on his project activity with the right perspective and attain fruitful results.

Science is popularly defined as an accumulation of systematic knowledge. But science is a method of approach to the entire empirical world. Further, it is an approach which does not aim at persuasion, at the finding of "ultimate truth," or at conversion. It is merely a mode of analysis that permits the scientist to state propositions in the form of "If

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<sup>1</sup> Spoken by the Vampire Marius in Ann Rice's book *The Vampire Lestat* Ballantine Books, New York, NY, 1985

---, then ---." Axioms or self evident propositions or deductions from those axioms is not science. The sole purpose of science is to understand the world in which man lives.

The relationship between theory and facts is not antinomies as popularly understood. Theory is a tool of science. 1. It defines the major orientation of a science, by defining the kinds of data which are to be abstracted. 2. It offers a conceptual scheme by which the relevant phenomena are systematized, classified and interrelated. 3. It summarises facts into (a) empirical generalisations and (b) systems of generalisations. 4. It predicts facts. 5. It points to gaps in our knowledge. On the other hand facts are also productive of theory. 1. Facts help to initiate theories. 2. They lead to the reformulation of existing theory. 3. They cause the rejection of theories which do not fit the facts. 4. They change the focus and orientation of theory. 5. They clarify and redefine theory.

Science and values are related on a different plane. Science rests upon a series of postulates or assumptions. The assumptions are: 1. The world exists. 2. We can know the world. 3. We know the world through our senses. 4. Phenomena are related causally. These postulates are not provable, but they are true because we wish them to be true. In this sense science is founded upon evaluative assertions. An ethic is more than the presence of a basic value or values. It is also injunction to action. An appraisal of scientific work is not based on scientific process. It is value laden. There is ethic for every science which should not be ignored.

Modern trend is to lay emphasis on applied research than pure research. This is also described as doctrinal and non-doctrinal research. Non-doctrinal research is based on empirical experience of common sense. Doctrinal research is based more upon the theoretical premises already established in the concerned field. Major differences between common sense approach and scientific framework are as follows: 1. The scientific method goes beyond the solution of the practical problem. 2. The scientific method of solution involves controlled experimentation. 3. The scientific solution looks for broader generalizations. 4. Scientific experimentation is set against an existing body of generalizations. The task of the research student in the field of law is to appreciate all these aspects and choose a comprehensive method for his research.

Our understanding of concepts and conceptualization should also be clear. They are not basic to scientific method alone; they are the foundation of all human communication and thought. There are certain problems of concepts that should not be overlooked. Concepts develop from shared experience. Terms used to denote scientific concepts may also have meanings in other frames of reference. A term may refer to different phenomena. Different terms may refer to the same phenomenon. A term may have no immediate empirical referent at all. The meaning of concepts may change.

### **Reflective Thinking**

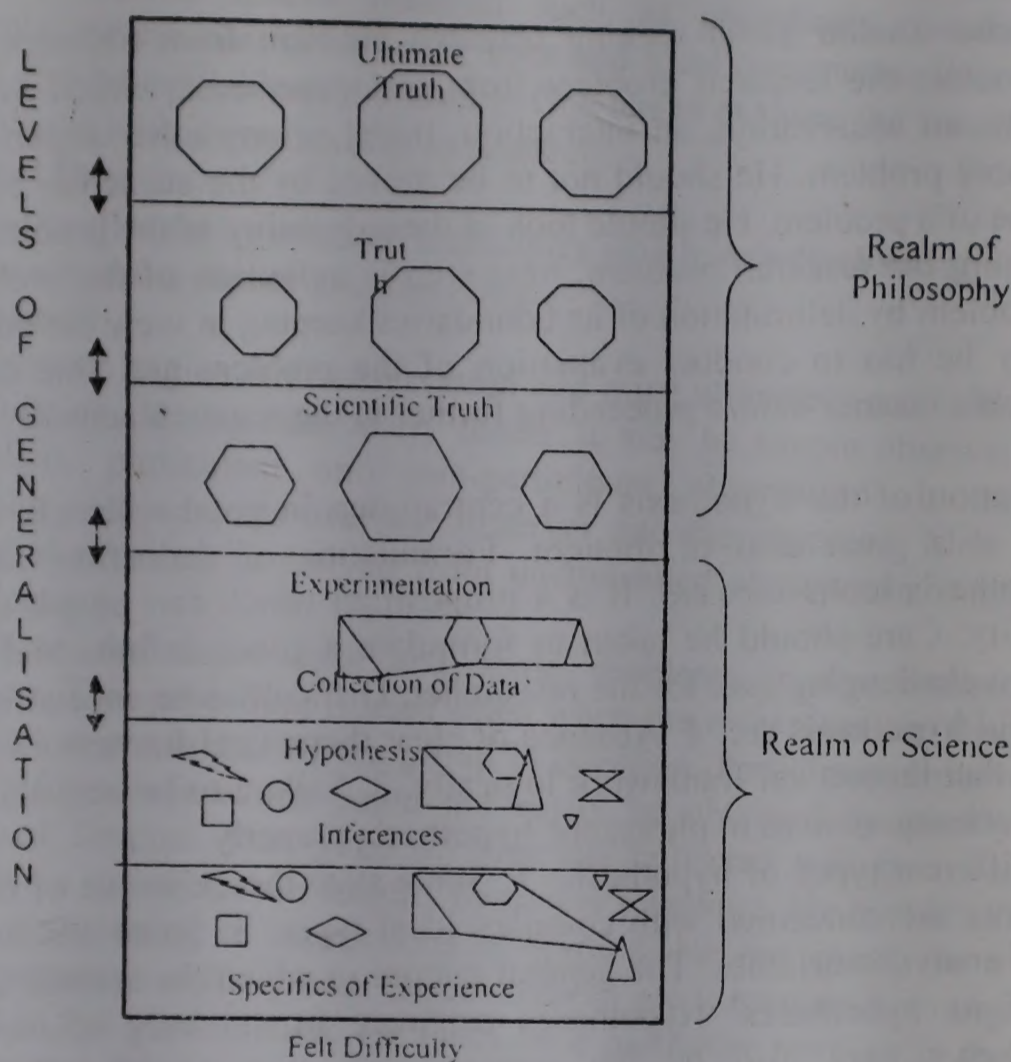
John Chaffee, author of *Critical Thinking* says, "Critical Thinking is my life, it's my philosophy of life. It's how I define myself... I am an educator because I think these ideas have meaning. I'm convinced that what we believe in has to be able to stand the test of evaluation."

Consolidation of thought process is essential before start up of a research project. Any research activity needs reflective thinking. Reflective thinking is a mental exercise of specific type. It is not a state of mind which accepts things as they are. It is that state of mind which does not accept any thing unless verified for its worth; i.e. truth value. It is a tomorrow mind not a yesterday mind; it is a composer mind not a fiddler mind; it is a

questioning mind not resting mind; and it is a problem solving mind and not a problem gulping mind.

A reflective thinker is one who will not rest or live with the problem. Whenever he encounters a difficulty, he takes it as a challenge and formulates it into a problem to be tackled with an idea of solving that problem. He hypothesises the problem and gathers the required information or data and experimentally verifies it and arrives at the scientific truth. He will apply that scientific truth to the real situation by taking it away from laboratory condition and make the society to reap the benefits of the solution. Some researchers will try to attain the ultimate truth, which is seldom attained. Following are six steps of reflective thinking as described by John Dewey and T. F. Kelley:

### Six Steps of Reflective Thinking



### Levels of Generalisation

In every reflective thinking activity, every experience takes the thinker into the higher level of generalization. For example a person who comes across an orange for the first time says: One orange is yellow. When he comes across a few oranges, he generalizes his experience as: Few oranges are yellow. When he encounters a bushel of oranges his statement would be: A bushel of oranges are yellow. Ultimately, wherever he comes across oranges he finds them to be yellow and he reaches the highest level of generalization in the following statement: All oranges are yellow. But when he encounters a wizard plant producing blue arranges his generalization stands altered as: All oranges are yellow; but there are some oranges which are blue. This is a continuous

process. There is no end to the generalization process with regard to the phenomenon which is dynamic. Science has proved that every phenomenon is dynamic.

### **Survey of Previous Research**

Coming to the reflective thinking, we have seen in the diagram above that specifics of experience are the basis for felt difficulty which is the starting point of the problem. The researcher has to carefully select the problem out of the difficulties he faces. A survey of the previous research will help him in choosing the right problem. There are many advantages of making a survey of previous research. Global survey is preferred to the national or regional survey. The researcher has to look into all research documents. This provides clues for further research needed in the area. It also helps to avoid repetition. Finally it provides a scientific basis for research.

### **Research Problem**

The researcher should avoid seeking research problem from his supervisor or guide. He should select the research problem from real experience, which may be an outcome of a study, an observation, an interaction, travel or any other experience. He should select a viable problem. He should not be moved by the attraction of big and most appealing type of a problem. He should look at the solvability of the problem.

After selecting the research problem, next step is definition of the problem. He has to fence the problem by delimitation of its boundaries keeping in view the duration of the project. Finally he has to conduct evaluation of the problem and fine tune it in whatever best possible manner before proceeding further in the research activity.

### **Hypothesis**

The formulation of the hypothesis is a central step in good research, and it is important to give it a great deal of thought. Formulation of deduction constitutes hypothesis. A hypothesis looks forward. It is a proposition which can be put to test to determine its validity. Care should be taken to formulate a good, definite and testable hypothesis. This is a challenging task for the researcher. Difficulties he encounters in the formulation of useful hypothesis are: 1. Absence of clear theoretical framework. 2. Lack of ability to utilize that theoretical framework logically. 3. Failure to be acquainted with available research techniques so as to phrase the hypothesis properly.

There are different types of hypothesis: 1. Some state the existence of empirical uniformities. 2. Some are concerned with complex ideal types. 3. Some are concerned with the relation of analytic variables. The general culture in which the science develops furnishes many of its hypotheses. Hypotheses originate in the very science itself. Sometimes, hypotheses may also be the consequence of personal, idiosyncratic experience of the researcher.

The characteristics of usable hypotheses are: 1. They must be conceptually clear. 2. They should have empirical referents. 3. They must be specific. 4. They should be related to available techniques. 5. They should be related to a body of theory. If some of these clues are seriously considered while formulating the hypothesis it would lead to a fruitful research. Many studies fail precisely at this point. If right question is asked, the researcher may make great stride in his work.

### **Collection of Data**

Most important step in research is collection of data to test the hypothesis. Data should be scientific; otherwise the result may not be of required truth value and scientific.

What kinds of data should be collected depends upon the topic. Data required for doctrinal and empirical research will be different.

### **Use of Library**

For doctrinal research, usually library material including computer aided data, e-library, internet, websites, etc is used. Library is not a mere store house of books. There is a scientific method of using library. One should know how to use card catalogue. Indexes in terms of subject index, author index, etc. are available in a scientifically built library. Periodical indexes, national and trade bibliographies, subject bibliographies, library catalogues, national catalogues, union catalogues, etc. are of great help in getting at the appropriate data. There are a number of reference books such as dictionaries, encyclopedias, year books, directories, bibliographical dictionaries will be available in the library. Some special material such as periodicals, business and commerce documents, government documents, state and local documents, international documents, etc. will also be available in the library. One has to evaluate the source material and use it in accordance with its truth value in research.

### **Empirical Data**

It is collected by research techniques which include observation, questionnaire, interview schedule, survey and sampling.

#### **Observation**

Science begins with observation and must ultimately return to observation for its final validation. It may take many forms. It may be simple observation which may be uncontrolled, participant and non-participant observation. It may be systematic observation with controls over the observer and the observed. Most of the knowledge about social relations is derived from uncontrolled observation, whether participant or non-participant.

There are some uses and some problems in the uncontrolled participant observation. This procedure is used often when the researcher can disguise himself as to be accepted as a member of the group in question. Participant observer has access to a body of information which could not easily be obtained by merely looking on in a disinterested fashion. The range of materials collected will be much wider than that gained from a series of even lengthy interview schedules. He is able to record the context which gives meaning to expressions of opinion. He can check the truth of statements made by members of the group. Disadvantages are it narrows his range of experience to the extent of his participation. He takes on a particular position in the group and is not able to observe others. If his role is important it may change the group behaviour. His emotional participation may make him lose objectivity. Finally, there is a problem of observation control.

Non-participant observation may answer some of these problems. He can shift his roles and ascertain multiple facts, if his role is properly defined. Non-participant observation is usually quasi-participant observation.

In systematic observation, there are controls over the observer and the observed. Formal interview, the inventory or schedule and the maps may be the controls over the observer. Controlled observation may also be directed toward situations which are natural, but in which the subjects are aware that they are being observed. Systematic observation limits the bias of the individual observer partly by making the subjects feel the situation as natural, but far more through the application of controls on the observer in

the from of mechanical synchronizing devices, team observation, films and recordings, schedules and inventories, the development of elaborate categories for locating and coding observed behaviour quickly.

### **Questionnaire**

Questionnaire refers to a device for securing answers to questions by using a form which the respondent fills himself. Any questionnaire must be limited in length and scope. Every item in a questionnaire ideally constitutes a hypothesis or part of it. Developing a questionnaire can be thought of as moving from the "inside" outward.

There should be a logical progression in the questionnaire with following clues: 1. that the respondent is drawn into the interview by awakening his interest; 2. easily brought along from items which are simple to answer to those which are complex; 3. not affronted by an early and sudden request for personal information; 4. never asked to give an answer which could be embarrassing without being given an opportunity to explain; and 5. brought as smoothly as possible from one frame of reference to another rather than made to jump back and forth.

After construction of the questionnaire keeping above mentioned clues in mind and consulting the experts, a pilot study and pretest should be conducted to verify the questionnaire. After this the questionnaire is administered to the respondents.

A flow chart has to be maintained on the following lines:

1. issuance or transmission to the respondent
2. waiting for completion or return
3. receipt after completion
4. checking of the form
5. filing of the form plus any additional records which may allow quick reference to it
6. coding, which may be divided into several steps
7. checking of the coding, whether done by spot checks of items or of whole interview forms
8. tabulation, simple or complex
9. tabular presentation; and
10. checking of the tabular calculations.

### **Interview Schedule**

It is the name usually applied to a set of questions which are asked and filled in by an interviewer in a face-to-face situation with another person. Skilled interview is to avoid certain types of errors, by developing alertness to ambiguities and deceptions and by becoming aware of the purpose of interview and the level of interaction. It is used to for eliciting data from busy persons; for eliciting data of unique nature; for eliciting data of confidential nature; and for eliciting data of sensitive nature. Hence there is a need for careful drafting of the schedule; systematic administration procedure and scientific storage of data collected. There should be what is known as Interview Guide. It is a list of points or topics which an interviewer must cover during the interview. It is a tool of social process. Interviewer should develop good insight. The clues are:

1. Develop alertness to the fact that there are many subliminal cues and one can learn to read them.
2. Attempt to bring these cues to a conscious level, so that comparison can be made with the hunches of other observers and interviewers.

3. Systematically check the predictions made from these hunches, to see which are correct.

### Survey

- Perspectives: \*Social survey \*Economic survey \*Political survey  
\*Statistical survey
- Range: \*Global \*Regional \*National \*State \*District \*Municipal \*Village

### Sampling

A sample must be representative and it must be adequate. It means the careful delimitation of the universe to be sampled as well as the definition of the observations which are to constitute the sample. Sampling can be random and stratified. Random sampling requires: that the definitions of the universe and of the observations are precise and coincide with each other; that the definition or list of universe is complete; and that the mechanical procedure of drawing the sample is easy to carry out and does not introduce bias of its own. Stratified sampling is use of smaller sample with greater precision. Homogenous universe requires smaller sampling. Requirements of division into homogeneous categories are: Criteria for division be correlated with the variable being studied; and Criteria used not provide so many sub-samples as to increase the size of the required sample. Adequacy of the samples must be evaluated by using tools of the arithmetic mean and standard deviation and the standard error.

### Analysis of Data

- Use of computer for storage & classification of data
  - Methods of verification and analysis of data while writing the report
- |                         |   |                           |
|-------------------------|---|---------------------------|
| 1. Descriptive method   | } | Applied in social science |
| 2. Analytical method    |   |                           |
| 3. Historical method    |   |                           |
| 4. Sociological method  |   |                           |
| 5. Sociological method  | } | Applied in social science |
| 6. Philosophical method |   |                           |
| 7. Experimental method  | } | Applied in science        |

### Experimental Methods: Individual: J. S. Mill

Basic rules to be observed in conducting experiments are as follows:

1. Keep all the factors under control.
2. Introduce single variable.
3. Introduce any one of the methods given below.

#### 1. Method of Agreement

The factor in which both the controlled premise and the experimental premise agree is either the cause or effect of the phenomenon that results in both the situations.

For example:

$$A + B + C = Z$$

$$C + D + E = Z$$

$$C = Z$$

#### 2. Method of Difference

The factor in which both the controlled premise and the experimental premise differ is either the cause or effect of the phenomenon that is produced in both the situations. For example:

$$A + B + C = Z$$

$$A + B + \text{Non-C} = \text{Non-Z}$$

$$C = Z$$

### 3. Joint Method of Agreement and Difference

The factor on which both the controlled and experimental premises agree in producing the phenomenon and the factor on which both the controlled and experimental premises differ is either the cause or effect of the phenomenon.

$$A + B + C = Z$$

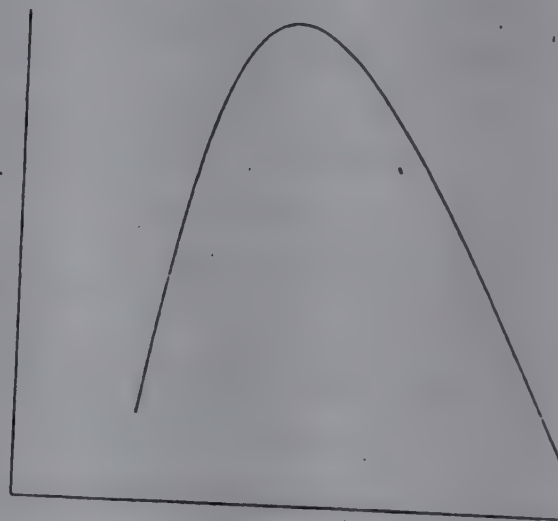
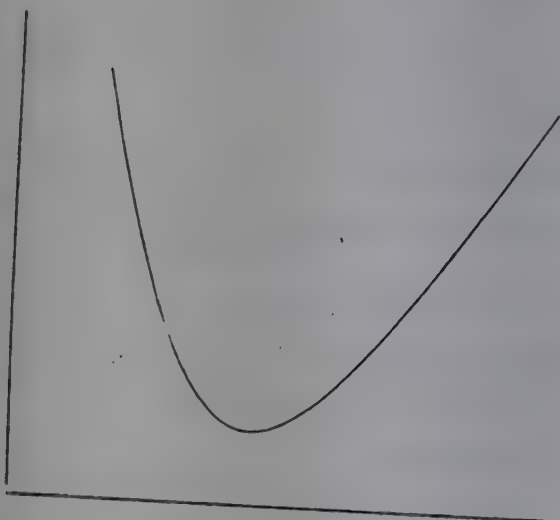
$$C + D + E = Z$$

$$A + B + \text{Non-C} = \text{Non-Z}$$

$$C = Z$$

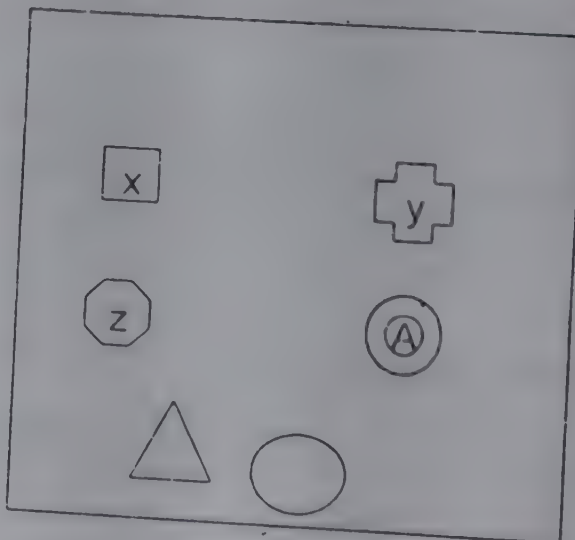
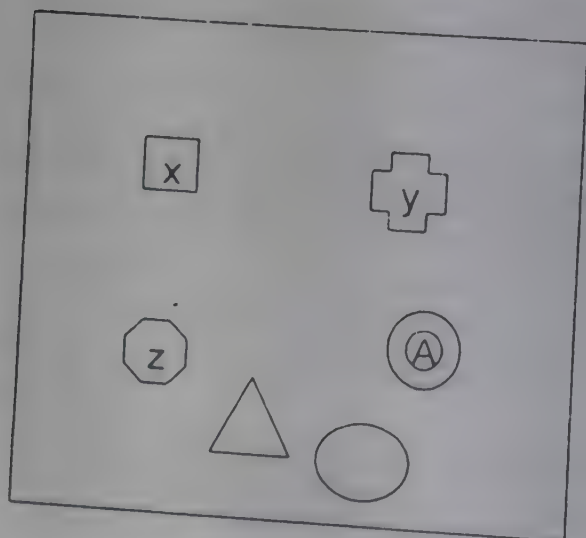
### 4. Method of Concomitant Variations

Change in the controlled factor in a particular manner effecting change in a certain manner in the experimental factor is either the cause or effect of the phenomenon.



### 5. Method of Residues

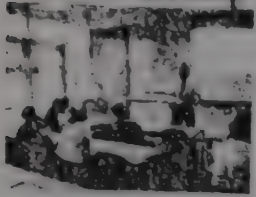
Deduct all the factors in the controlled group which are the causes or effects of the factors in the experimental group. The remaining factors in the controlled group are either the cause or effect of the remaining factors in the experimental group.



## Group Experimentation (Mc Call):

### 1. One Group Method

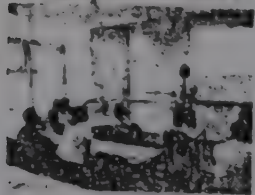
Experimental situation = 75%



Controlled situation = 50%

### 2. Equivalent Groups Method

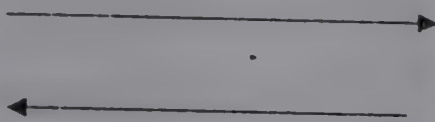
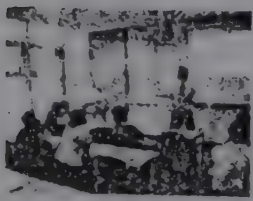
Experimental situation = 75%



Controlled situation = 50%

### 3. Rotation Method

Experimental situation = 75%



Controlled situation = 50%

## Writing the Report

- Title of the report
- Chapter headings
- Sub-chapter headings
- Paragraphing
- Use of italics
- Use of inverted commas or quotes
- Use of punctuations
- Footnotes, chapter-notes or endnotes

## Report: Substantive Aspects

- Logical framing
- Continuity
- Reasoned division of material
- Simple language
- Brevity
- Authenticity
- Unity of material
- Integrality

## Title

Impact of Information Technology on IPR: A Critical Study with Special Reference to India

## Chapters

- I. Introduction
- II. Historical development of IT and IPR
- III. Substantive – i: IT as IPR
- IV. Substantive – ii: IT as facilitator of IPR
- V. Substantive – iii: IT as regulator of IPR
- VI. Substantive – iv: IT as infringer of IPR
- VII. Critical evaluation
- VIII. Conclusions and suggestions

### I. Introduction

1. Importance of the topic
2. Aims and objectives of the study
3. Problem statement
4. Survey of previous research
5. Inferences and hypothesis
6. Methodology followed
7. Chapters

### Example of Paragraphing

Development of information technology on exponential scale is a boon as well as a bane for the regime of intellectual property rights. It can be protected as intellectual property rights. It is a facilitator of IPR. It is also used for regulating IPR. But it seriously disturbs the IPR by raising ethical problems.

Information technology can be protected as patent if it is new, useful and capable of industrial application. It can also be protected as copyright if it is a literary work. It can be protected as a service mark if it relates to any service. It can be protected as an integrated circuit layout design.

### Example of a Quote

According to Arnold Toynbee, famous British historian, "In earlier centuries, foreign invaders conquered India. In this century, Indian ancient thoughts and wisdom will conquer the world."

### Example of Citation

1. *Coco v. Clark* (1969) RPC 41)

### Example of Footnotes

1. S.102(b) of Title 19 USC
2. *The Hindu*, June 2, 2007
3. Aminu Joseph, Patently unfair, *The Hindu*, December 12, 2004
4. *Vijay Times*, August 17, 2005, P.9
5. S.5 of the 1970 Act dealing with process patent is deleted by Third Amendment.

### Example of Endnotes

...When we look to it standing on the terrain of 21st century we get valuable messages of humanism to avoid misery and to strengthen the concern for dignified subsistence. Application of them appreciably adds to the task of translating the constitutional value goals into reality.

### Endnotes

1. I.S.Pawate, *Daya-Vibhaga*. Second Edition, Dharwad: Karnataka University, 1975

2. M.Rama Jois, *Constitutional and Legal History of India* vol. I, Bombay: N.M.Tripathi,
3. N.Chandrashekhara Aiyar (Ed.) *Mayne's Treatise on Hindu Law and Usage*, Madras:
4. Higginbothams, 1953
5. P.V.Kane, *History of Dharmashastra* Vol III
6. Yajnavalkya Smriti
7. Mitakshara (Gharpure translation)
8. S.K.Purohit, *Ancient Indian Legal Philosophy*, New Delhi: Deep& Deep Publications. 1994

### **Bibliography**

- Working bibliography
- Select bibliography
- Bibliography
- Annotated bibliography

### **Ingredients of Bibliography**

- Books
- Journals
- Reports
- Websites
- Legislation
- Encyclopedia

### **Method of Bibliography**

- Author
- Title of the work
- Volume (if any)
- Edition (if any)
- Year of publication
- Name of the publisher
- Place of publication
- Page numbers

### **Example**

#### **Book:**

I. Narayanan P., *Intellectual Property*, Vol. I, 3rd Ed., 1999, N.M Tripathi Pvt. Ltd., Bombay, Pp. 12-22.

#### **Journal:**

I. Narayanan P., "Interface between IT and IPR," 12 *JJI R* 2007 Pp 12-22.

### **Conclusion**

Working for a project is a challenging task. It has to be done in a carefully devised project plan fully incorporating the required research methods and tools. The project report should be drafted in such a way that it is scientific as well as reflection of reality. The long cherished Indian value of "*Satyameva Jayathe*" should be the nucleus of every project report. Faith and social values should not be lost in the glitter of truth.



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(2)

## PRINCIPLES OF IP

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## SCOPE

- Intellectual Property
- Trademarks
- Copyrights
- Designs
- Patents



## INTELLECTUAL PROPERTY RIGHTS

- Creation of mind or intellect
- Intangible property with commercial implications
- Technology driven economy
- IP- A new paradigm to determine market capitalization



## INTELLECTUAL PROPERTY

- Origin of Intellectual property - not recent
- Ancient man marked cattle, goods
- Acquired "rewards" for manufacturing unique products
- These practices were codified as laws



## TRADE MARKS

- TRADE MARK
  - is a word, device, sign or symbol capable of graphic representation
  - indicates the origin of goods and distinguishes the same from those of others



## FUNCTIONS OF TRADEMARK

- TRADE MARK
  - Identifies the product and its origin
  - Guarantees its unchanged quality
  - Advertises the product



## TYPES OF MARKS

- GENERIC
- DESCRIPTIVE
- PERSONAL NAMES
- SUGGESTIVE
- ARBITRARY
- INVENTED



## GENERIC WORDS

- Common name of a product
  - inherently generic; or
  - becomes generic Eg. Zipper
- Is or becomes part of public domain thus not a monopoly
- Examples: Energex (generic word Energy), Linoleum, Gramophone, Epsom, Aspin, Thermos, Escalator



## DESCRIPTIVE WORDS

- A word which describes the character or quality of the product
- Generally, no protection unless a substantial degree of secondary meaning shown – Eg., Hercules for cycles
- GENERIC TMs: Graphite for pencils, Tastee-Freez for ice cream, Needle-Tip for saws & saw blades, Soflens for contact lens (ALL REFUSED)



## PERSONAL NAMES

- A word which ordinarily denotes a surname or a personal name
- No protection unless a rare surname or secondary meaning is shown
- Examples: Bajaj, Kirloskar, Modi, Godrej



## SUGGESTIVE NAMES

- Words that do not describe the quality/origin/character of goods
- Requires imagination and perception to guess the nature of the product
- Protected on showing of secondary meaning
- Examples: Whirlpool, Surf, Vaporub, Superflame, Safegaurd, Limca



## ARBITRARY WORDS

- Common word having meaning unrelated to the nature of the goods
- Protected even in the absence of secondary meaning
- Examples: Promise, Prudent, Wheel, Liberty



## INVENTED WORDS

- Made-up mark/coined words having no dictionary or common meaning
- Protected even in the absence of secondary meaning
- Examples : Kodak



## ADVANTAGES OF TM REGISTRATION

- Legal presumption of ownership
- Exclusive right to use the mark in connection with the goods and/or services;
- An ability to bring an action concerning the mark in a court;
- A basis to obtain registration in foreign countries; and
- An ability to file the registration with the Customs Service to prevent importation of infringing foreign goods.



## MAINTENANCE OF TM

- Monitoring the register for conflicting marks, registered or pending
- Monitoring the market for instances of infringement and/or passing off



## COPYRIGHT ©?

- A copyright
  - Right that the government gives an author
  - For any original work of expression
  - Excludes others from copying or commercially using the work without proper authorization
  - Examples: books, plays, songs, catalogs, maps, computer programs, labels, movies, drawings, sculpture, prints



## COPYRIGHT

### • COPYRIGHT

- protects the expression, not the idea, of an artistic/ literary/ musical/ dramatic work and cinematograph films and sound recordings
- not concerned with the originality of ideas, but only with the originality of expression
- does not prevent accidental independent creation of an identical or similar work



## COPYRIGHT

- |                         |                                                |
|-------------------------|------------------------------------------------|
| ≡ Copyright subsists in | ⇨ First owner of copyright                     |
| ≡ Literary work         | ⇨ Author                                       |
| ≡ Dramatic work         | ⇨ Author                                       |
| ≡ Musical work          | ⇨ Composer                                     |
| ≡ Artistic work         | ⇨ Artist                                       |
| ≡ Photographs           | ⇨ Person taking the photograph                 |
| ≡ Cinematograph         | ⇨ Producer of the film                         |
| ≡ Computer Programs     | ⇨ Person who has caused the work to be created |



## NOTABLE FEATURES OF COPYRIGHT

- Literary work includes Computer Programs including Source and Object Codes
- Artistic work includes industrial drawings. The protected act includes the right to reproduce in 3 dimension, a 2 dimensional work or vice-versa
- The defense of design registrable/registered features (aesthetic features) is an exception to the claim for copyright infringement (Samsonite Case)



## ADVANTAGES OF COPYRIGHT PROTECTION

- Preventing Piracy
- Initiating infringement
- Violation of copy rights Claim damages



## INDUSTRIAL DESIGN

- Protects the external aesthetic / ornamental appearance or characteristic of a product
- Judged by the eye of the observer
- Does not include patentable subject matter or trade marks

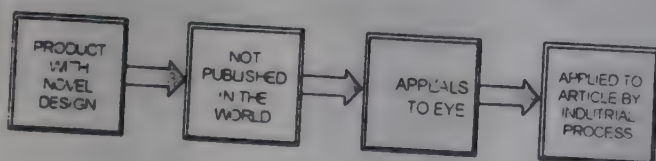


## INDUSTRIAL DESIGN

- Must be Novel or Original (Not Published anywhere)
- Must relate to features of shape, configuration, pattern, ornamentation or composition of lines or colours applied to an article in two or three dimensional form of both
- Applied to any article by any Industrial means or process
- Such features to be eye-appealing & judged solely by the eye.



## REGISTRABLE DESIGNS



CAN BE REGISTERED AS DESIGN



## EFFECTS OF REGISTRATION

- "Copyright" - in the design subsists for an initial period of 10 years;
- Extendable for one non-extendable period of 5 years;
- Right to take legal action against others who are infringing the design and to claim damages;
- May deter a potential infringement;



## EFFECTS OF REGISTRATION

- An exclusive right to make, sell, import, export, any product to which the design has been applied; and
- Permitting others use the design under the terms agreed with the registered owner



## ENFORCEMENT

- Civil remedy only
- Civil suit for injunction, damages & accounts



## SAMSONITE CASE

- Samsonite Corp V Vijay Sales – 1998
- Facts
  - Sale of suitcases by Vijay Sales (VIP)
  - Plaintiff alleged Copying of Suitcases by VIP
  - Infringement of Copyright in artistic of the plaintiff ( three-dimensional representation of drawings)



## SAMSONITE CASE CONTD....

- Respondents
  - The features which are claimed as proprietary by Samsonite and sought protection under Copyright are all features of Shape, Configuration, which are aesthetic, ornamental and visual in nature, and hence protection can be claimed only under Designs Act but not under Copyright
- HELD
  - No distinctive trade dress
  - No protection available under Designs Act, since not registered under Designs Act



## PATENT

- A limited monopoly granted by a State to a person or a legal entity for an invention.
- Patent is for invention as against discovery



## PATENT

- A PATENT IS
  - A monopoly right granted to the patentee for a new or improved product or process for a limited period



## PATENT

- Grant from Government
- Patent owner has an exclusive right to prevent others from
  - making
  - using
  - offering for sale
  - selling
  - importing
 the patented invention
- Limited period of grant in exchange for full and complete disclosure of invention
- Not an absolute right to practice the invention



## DEGREE OF PROTECTION OFFERED BY IPRs

- What is forbidden / prevented ?

Patent	using the claimed invention
Design	making something similar that looks the same
Trade secret	unauthorized use by someone who has been let in on the secret
Copyright	copying the expression
Trademark	confusing the customer



## DEGREE OF PROTECTION OF IPRs

- How long does protection last?

Patent	20 years
Design	10 years
Trade secret	Until someone spills the beans
Copyright	Life of the author + 60 yrs
Trademark	As long as it is used & maintained



## LEGAL FRAMEWORK OF PATENT LAW IN INDIA

- Patents Act, 1970
- Amendments in 1999
- Patent (Amendment) Act 2002
- Patent (Amendment) Ordinance, 2004



## INVENTION UNDER PATENT ACT

- PRODUCT/PROCESS which has :
  - Novelty = New
  - Inventiveness = Non-obviousness
  - Utility = Industrial application
 can be patentable



## NOVELTY IS GLOBAL

- Invention must be New
- Disclosure in any form and in any part of the world destroys novelty
- In USA novelty is protected after disclosure till the expiry of 12 months



## NOVELTY UNDER INDIAN LAW

- 'A' made a presentation of his invention in United States
- 'A' files for a patent in India subsequently
- 'A's Indian Patent application is liable to be rejected due to lack of novelty



## OBVIOUSNESS

- Even if invention is "new", it should not be "obvious" to the person skilled in the art
- Mere workshop improvements will not constitute inventiveness
- Improvements made with a degree of ingenuity and skill constitute inventiveness



## OBVIOUSNESS

- A claims for latch mechanism for a hinge of visual display unit of a lap top
- Prior art discloses a similar hinge mechanism for piano lid, desktop calendar, kitchen cabinet etc
- Prior art is non-analogous art
- However, prior art references are pertinent to the problem solved by A
- A's patent is obvious



## INDUSTRIAL APPLICATION

- In addition to Novelty & Inventiveness, an invention must also be capable of Industrial Application.
- Invention without utility is non-patentable



## NON-PATENTABLE INVENTIONS IN INDIA

- Frivolous
- Contrary to natural laws, morality or injurious to public health
- Scientific principle or abstract theory  
e.g. Newton's law



## NON-PATENTABLE INVENTIONS IN INDIA

- Mere new property or mere new use of a known substance
- Mere admixtures (as opposed in synergistic mixtures) and processes thereof  
eg: explosive composition/alloys
- Arrangement or re-arrangement of devices in a known way



## NON-PATENTABLE INVENTIONS IN INDIA

- Method of agriculture or horticulture
- Treatment of humans & animals
- Plants & Animals
- Business Methods
- Computer program per se other than its technical application to industry or a combination with hardware
- Traditional knowledge



## WHO CAN FILE A PATENT

- Inventor(s)
- Applicant(s)/Assignee(s)
- Legal representative
- Singly or jointly
- Foreign national resident abroad



## JURISDICTION OF FILING

- Patent laws are territorial
- Patent applications have to be filed in each jurisdiction where ever enforcement is required
  - eg: An Indian patent holder cannot enforce infringement action in USA, unless a corresponding patent is existing in USA.



## WHERE TO FILE - JURISDICTION

- Appropriate office
  - Residence, principal place of business or domicile of applicant
  - Address for service, if above conditions are not met
  - Place where invention actually originated



## PRIORITY

- India follows the concept of first to file but not first to invent (only us)
- First Filer gets protection
- Securing novelty
- Preventing others



## CONSEQUENCES OF LOOSING PRIORITY

- Loss of priority of earlier patent application does not bar subsequent filing of patent applications
- Provided novelty is not lost by subsequent disclosure



## FILING OF INDIAN PATENT APPLICATIONS – OPTIONS

- Provisional patent application
- Complete patent application



## WHY PROVISIONAL APPLICATION ?

- Disclosure is incomplete
- Further scope for improvements
- Immediate threat of disclosure from competitors
- To secure priority date



## WHY PROVISIONAL APPLICATION ?

- Enables disclosure
- Enables licensing of technology
- Enables early marketing of invention
- 12 months time for improvements
- Provisional can be abandoned without carrying the risk of disclosure



## COMPLETE PATENT APPLICATION

- Sufficient disclosure
- Enablement of the invention (examples)
- Advantages
- Definition of the scope of the invention by way of "claims"
- No addition of new info may not be possible beyond this stage
- Format same as provisional with additional section on "claims"



## INFRINGEMENT OF A PATENT

- A Patent is infringed  
When subject matter of the invention as covered under the patent is used commercially without any authorisation
- Damages
  - Civil violation
  - Injunction
  - Loss on profits

## POLAROID CASE

- Instant Camera
  - Invented by Polaroid 1969
  - Copied by Kodak 1976
  - Suit by Polaroid
  - Kodak paid \$ 925 mn
  - Kodak shut down the plant worth \$ 1.5 bn

## XEROX CASE

- GUI
- Invented by XEROX
- No Patent in 1979
- Copied by Microsoft & Apple
- Xerox lost 2% royalty
- Xerox lost \$ 500 mn during 1984-98

## CONCLUSION

- IPR – Various types
- Protection of IPRs
- Legal Requisites for a Patent
- Procedural aspects of Patent in India



THANK YOU!!!



# **COPYRIGHT - INFRINGEMENT**

**Dr. M.N.Bheemesh**

- The term Copyright is coined from its own ingredient "the right to copy"
- Copyright is historically linked to written literary work.
- Plagiarism was not a problem
- Gutenberg invented Movable type & Caxton developed Printing Press
- The arrival of Technology made the printing of multiple copies possible

- Fair Dealing for a Research and Private Study
- Fair Dealing for criticism and review
- Fair Dealing for the purpose of Report current events
- Reproduction of work for Judicial proceedings
- Reproduction of work in Legislature's Work
- Reproduction of work in a certified copy made under any law
- Reading or Recitation in Public
- Anthologies for Educational use
- Use of copyrighted material in the course of education
- Performance of the work in the course of education

- Making sound recordings in respect of Literary, Dramatic or Musical work in certain cases
- Causing of a recording to be heard in Public
- Performance of a work by Amateur club/society
- Reproduction for use of Libraries
- Reproduction or publication of Unpublished Works
- Incidental inclusion of Artistic work in a Cinematograph film
- Adaptations
- Performance or communication of a work in official ceremony

## **Copyright has two types of roots**

- **An exclusive right to make copies, to reproduce the work of an author**
- **To protect the author from infringement**

## **International Conventions**

- **Berne Convention for the Protection of Literary and Artistic works 1886**
- **Universal Copyright Convention (Geneva 1952 ,revised at Paris 1971)**
- **TRIPs Agreement**
- **WIPO Copyright Treaty 1996**

## **Acts not constituting Infringement**

### **Common Law Exceptions:**

Act contrary to the public interest  
i.e., illegal, immoral or irreligious

### **Statutory Exceptions:**

#### **Fair dealing / Fair Use:**

-this means roughly that there will be no copyright infringement if the use made of the work is fair.

## **Fair Use**

-it may be a commentary, criticism or parody.

### **Things to be observed:**

- the purpose of the use
- The nature of the copyrighted work
- The amount and substantiality of the position used the affect of the use on the potential market.

## **COPYRIGHT – INFRINGEMENT**

Copyright infringement is the infringement of an intangible right in the expression of an idea.

The idea is not protected and copying the idea is not an infringement of copyright.

### **Types :**

- **Primary Infringement**
- **Secondary Infringement**

#### **Primary Infringement**

- the work is copied
- copies of the work are issued to public
- the work is lent or rented to public
- the work is shown or performed in public
- the work is communicated to public
- an adaptation is made

**Rights are protected in works not in ideas:**

-Idea is not a subject matter of copyright

*RG Anand v. Deluxe Films*

**Infringing Copy:**

In relation to literary work, dramatic, musical or artistic work, a reproduction thereof otherwise than in the form of a cinematographic film;

-In relation to a cinematographic film, a copy of the film made on any medium by any means;

-In relation to a sound recording, any other recording embodying the same sound recording, made by any means;

-In relation to a program or performance in which such a broadcast reproduction rights or a performer's right subsists the sound recording or a cinematographic film of such program or performance.

## **Secondary Infringement**

- The importation of an infringing copy of the work
- Possessing an infringing copy in the course of a business, selling it, letting it for hire etc.,
- Providing the means to make infringing copies of work
- Transmission of the work by means of telecommunications system
- Permitting the use of a place of public entertainment for an infringing performance of an work

## **Directing Copying:**

-here the defendant copies the plaintiff's work with some minor additions and alterations

## **Indirect Copying:**

-here infringer changes the form.

e.g.: Novel turned into a play, which in turn into a Ballet

## **Substantial Copying:**

it is a question fact and degree

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- 1952 Universal Copyright Convention.
- 1961 Rome Convention - Performer's, Producer's of Phonograms and Broadcasting Organizations.
- 1971 Geneva Convention - Producer's of Phonograms against Unauthorized Duplication of their Phonograms.
- 1972 Brussels Convention - Distribution of Programme - Carrying Signals Transmitted by Satellite.
- 1996 WIPO Copyright Treaty.
- 1996 WIPO Performance and Phonogram Treaty

## **Indian Law dealing with Copyright**

The Indian Copyright Act was first passed in 1957. A few amendments were made in 1983 & in 1984. However keeping in view with the latest developments in the field of technology, especially in the field of computers and digital technologies. The new amendment Act called the Copyright (Amendment) Act, 1994 (38 of 1994) was passed and this made Indian Copyright Law is one of the toughest in the world. This included the definition of "Computer Program" also in its ambit. It clearly explains the rights of Copyright holder, position on rentals of software, the rights of the user to make backup copies and the heavy punishment and fines on infringement of Copyright of software. It also make it illegal to make or distribute copies of copyrighted software without proper or specific authorization.

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  - Fair Dealing for criticism and review
  - Fair Dealing for the purpose of Report current events
  - Reproduction of work for Judicial proceedings
  - Reproduction of work in Legislature's Work
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## **Cyber Crimes and IPR**

Seeing in retrospect, problem of infringement of IPR's was not very acute because there was no photocopiers, no computers, no internet. Now the canvas has changed; the milieu is different.

## **Copyright has two types of roots**

- An exclusive right to make copies, to reproduce the work of an author
- To protect the author from infringement

## **Remedies for Infringement of Copyright:**

### **-Civil Remedies**

-Preventive Civil Remedies

-Compensatory Remedies

### **-Criminal Proceedings**

### **-Administrative Remedies**

-Registrar of Copyrights to make an order prohibiting importing of copyrighted works from outside.

## **Civil Remedies**

### **-Preventive Civil Remedies**

-Interlocutory Injunction

-Mareva Injunction

-Anton Piller Order

-Permanent Injunction

### **-Compensatory Remedies**

**Damages**

**Damages for conversion/delivery up**

**Account of Profits**

In the 18th Century there was continuous dispute and litigation over relationship between Copyright subsisting at Common Law and Copyright under the Statute of Anne. This was finally settled by the House of Lords in the case of Donaldson Vs. Beckett in 1774, which ruled that at Common Law the author had sole right of printing and publishing his books, but that once a book was published the right in it were exclusively regulated by the Statute.

### **IPR's Criminal Jurisprudence : Changing Scenario :**

Sophisticated methods of commission of different crimes adopted by the criminals in any branch of Criminal Law haven't left the field of IPRs untouched. Cracking of websites, hacking of internet, demolishing of security, use of common trade names as domain names without permission from the owners of the same is done regularly and unscrupulously by highly trained professionals in order to make wrongful economic gains at the expense of IPR's of the others.

### **Criminal Proceedings:**

-Punishment for 6months may be extended up to Three years with fine from Rs. 50,000 to 2 Lakhs

### **Knowing use of Infringing copy of Computer Program:**

Punishment for 7 days may be extended up to Three years with fine from Rs. 50,000 to 2 Lakhs

-Power of police to Seize the Infringing Materials and plates for making copies

### **Compulsory Licenses**

-works withheld from public

-in unpublished Indian Works

-License to Produce and publish translations

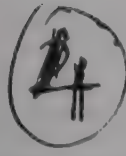
**All these will be made through the Copyright Board by the Registrar**

The idea of Copyright protection only began to emerge with the invention of printing, which made it possible for literary works to be duplicated by mechanical processes instead of being copied by hand. This led to the appearance of a new trade - that of printers and booksellers in England called " Stationers". These entrepreneurs invested considerable sum in the purchase of paper, in buying or building press, and in the employment of labour involving an outlay which could be recouped with a reasonable return over a period of time.

By the end of the Seventeenth Century the system of privileges i.e. the grant of monopoly rights by the Crown was being more and more criticized and the voice of authors ascertaining their rights began increasingly to be heard; and this led in England in 1709 to what is acknowledged to be the first Copyright Statute - "**The Statute of Anne**".

### **Performers' Right**

- Actors, Dancers, Musicians, Jugglers, Acrobats and Singers enjoy this right
- if any person makes a sound recording, reproduces sound or visual recording, Communicates the performance or Broadcasts the performance without the permission of the performer it amounts to Infringement.



# **COPYRIGHT - INFRINGEMENT**

**Dr. M.N.Bheemesh**

- The term Copyright is coined from its own ingredient "the right to copy"
- Copyright is historically linked to written literary work.
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***Thanks....***



# LEGAL RIGHTS OF FARMERS AND LEGAL PROTECTION OF PLANT VARIETIES: AN ASSESSMENT\*

Dr. J. S. Patil\*\*

## INTRODUCTION

Agriculture is the prime mover of the Indian economy, largest employer, biggest and very old enterprise. Thirty-one percent of the GDP comes from agriculture and around sixty four percent of its labour force is dependant on agriculture.<sup>1</sup> The rapid agricultural growth from mid 1960s that brought about transformation in the production system and genetic improvement of plants are some of the important factors that transformed India's agriculture. In many crops large number of land races, farmers' varieties and scientifically developed cultivars existed in the 19<sup>th</sup> and early part of the 20<sup>th</sup> century and much of it have been replaced by new and better varieties.<sup>2</sup> Increased food production must keep pace with the country's population increase. To keep pace with the present population growth and consumption pattern, India's food requirement has been estimated to cross 225 million tons by 2005 AD. This would mean an annual agricultural growth rate of 6.7 percent, a daunting task considering the rapidly shrinking resource-base and fast declining input-use efficiency in major cropping systems. Notwithstanding the impressive gain in the agricultural production, the vast agricultural potential still remains highly under-utilized. There are serious gaps both in farm yield realization and technology transfer, as the national average yield of most crop varieties is low.<sup>3</sup> This is attributable to the recent Indian policy of yielding to the pressures of the developed countries and altering IPR laws to suit their convenience. A systemic change can bring in the transformation. Farmers' rights play important role in bringing this transformation.

Unfortunately, farmers in developing country like India are under assault. Governments are increasingly tuning in with MNCs in their mindless pursuit of fast track growth, leaving people out of discourse.<sup>4</sup> Globalisation and its impact on the developing countries form an agenda for discussion in various forums on a regular basis. However, the expansion of the process of globalisation with its bases on free movement of capital and free flow of trade and its direct bearing on the sustenance of the common people of the third world is a matter of grave concern. As the north-south divide continues to exist, colonisation takes its course in a different form by controlling the vital resources of the third world with the support of a set of multilateral treaties.<sup>5</sup> For several years now, ever since the Trade-related Intellectual Property Rights (TRIPs) were introduced in the WTO negotiations, the multinational

\* Paper presented at One-day National Workshop on New Challenges in IPR Law: Towards Harmonisation of Uniform Rules organized by University College of Law and PG Department of Law, Bangalore University, Bangalore on 29<sup>th</sup> April 2008

\*\* Professor of Law and Special Officer, Karnataka State Law University, Hubli-Dharwad

<sup>1</sup> C. Niranjan Rao. "Indian Seed System and Plant Variety Protection". *Economic and Political Weekly*, February 21, 2004 p.845

<sup>2</sup> General Guidelines to the examination of DUS and the development of harmonized descriptions of plant varieties, *Plant Variety Journal of India* Volume I, No. 1

<sup>3</sup> Kuldip R. Chopra, Present Status of Indian Seed Industry: Value Addition through Biotechnological Application and their Relevance to Farmers, *Krishiworld*.

<sup>4</sup> The ill effects of such corporate-driven lop-sided policy planning, book review on Vandana Shiva's *Globalization's New Wars: Seed, Water & Life Forms*, in *Combat Law*, Vol 4 Issue 4 June - July 2005

<sup>5</sup> *Ibid*.

seed industry has been pressing for a complete control over the seed business. And that can only happen if the farmers are divested of all their traditional rights over seed.<sup>6</sup> Under TRIPS member nations are required to grant patents on micro-organisms, non/biological and microbiological processes as well as effective IPR protection for plant varieties. TRIPS provides a choice for protecting plant varieties. Members may choose from patents or a *sui generis* system (particular to the nation) or a combination of the two.<sup>7</sup> This has hit considerably the interests of farmers in the developing countries including India.

Farmers are integral to the economy of most developing countries. There is currently a broad consensus that farmers, being custodians of genetic diversity, should be granted rights for their enormous contributions in identifying and conserving plant genetic resources. Farmers' rights recognize farmers as equivalent to breeders and give a farmer who has bred or developed a new variety a right of registration and protection in similar manner to a breeder.<sup>8</sup> Most developing countries including India have decided not to have patents for plant varieties and have instead chosen the *sui generis* option. The *sui generis* system means any system a country decides on, provided it grants effective plant breeders rights. TRIPS does not specify what kind of breeders rights and it does not say what else a member state can put in its law, apart from breeders rights. In short, TRIPS is a flexible system leaving a lot to the discretion of members. As a response to the TRIPS agreement, India has started enacting a series of domestic laws to implement the commitments it has made and also to contain the loss of genetic diversity and sustain agricultural growth and to position India to get maximum advantage. The Protection of Plant Variety and Farmers, Rights Act, 2001<sup>9</sup>, is the Indian *sui generis* legislation passed by the Parliament which is a significant leap forward. In the long run it would facilitate the growth of the seed industry and make available high quality seeds and planting material to the farmers. Implementation of the Act is understood to accelerate agricultural development; protect plant breeder's rights for creating new plant varieties through higher research and development investments in both public and private plant breeding. Above all it would protect the rights of the farmers for the contributions made in conserving, improving and making available plant genetic resources for the development of new varieties. Discussion in this paper is restricted to the assessment of legal rights of farmers and legal protection accorded to plant varieties with specific reference to the Protection of Plant Variety and Farmers, Rights Act, 2001 under global scenario.

## LEGAL PROTECTION OF PLANT VARIETIES

Legal protection of plant varieties is an outcome of the northern countries demand as they are strong in biotechnology. But it was resisted by the south as they are rich in biodiversity. Some of the international, regional and national laws relating to the protection of plant varieties are briefly discussed before making an analysis of the legal regime in India to make proper assessment of the Indian law.

<sup>6</sup> <http://www.agbioindia.org/archive.asp> visited on April 20, 2008

<sup>7</sup> Suman Sahai, "Protecting farmers, freeing the breeders", *India Together*, 10-4-2008

<sup>8</sup> Elizabeth Verkey, "Shielding farmers' rights", *Journal of Intellectual Property Law & Practice*, doi:10.1093/jiplp/jpm189, published online on October 27, 2007

<sup>9</sup> Act No. 53 OF 2001 [30th October, 2001] published in *The Gazette of India Extraordinary*, Part II, Section 1, No. 64, New Delhi, October 30, 2001

A PVP framework comprises of a number of provisions and clauses. Novelty, distinctness, uniformity and stability (NDUS) are the fundamental criteria for according protection to plant varieties. A critical instrument for safeguarding 'public interest' is compulsory licensing. This provision enables the state to ensure availability of adequate quantities of propagating material of protected varieties at reasonable prices. These two clauses, therefore, find a place in the laws of many countries. Some countries extend protection to all new varieties while few others have specified the list of genera and species eligible for protection, with a provision for extending the list. In order that protected varieties come into public domain at the earliest, developing economies have opted for shorter duration of protection. Researcher's privilege and farmer's privilege find explicit mention in the legislations of some countries. Apart from protecting absolutely novel varieties, some countries have provisions for the protection of essentially derived varieties (EDVs), to prevent cosmetic breeding. Member countries of conventions and regional agreements grant rights to breeders from other member countries. Alternatively, reciprocal treatment is on a bilateral basis. Penalties for infringement and other offences are usually restricted to monetary compensations. Only a few legislations propose imprisonment and other criminal proceedings as deterrents.<sup>10</sup> Some of the countries which have brought about laws relating to plant variety protection along with the year of making the law are given in the table below.

**Table 1: List of countries with year of enactment/amendment of PVP law**

Sl No	Country	Year	9.	Croatia	1997	SI No	Country	Year	26.	South Africa	1987
1.	Australia	1994	10.	Czech	1989	18.	Morocco	*	27.	Spain	1993
2.	Austria	1993	11.	Denmark	1994	19.	Netherlands	1984	28.	Sweden	1985
3.	Belarus	1995	12.	Finland	1992	20.	New Zealand	1994	29.	UK	1983
4.	Bolivia	1993	13.	France	1970	21.	Norway	1993	30.	USA	1994
5.	Canada	1990	14.	Ireland	1980	22.	Poland	1987	31.	Uzbekistan	1996
6.	Chile	1977	15.	Italy	1986	23.	Portugal	1991	32.	Venezuela	1993
7.	China	1999*	16.	Kenya	1972	24.	Russia	1993	33.	Zimbabwe	1974
8.	Colombia	1994	17.	Moldova	1991	25.	Slovenia	1989	34.	India	2001

## TRIPS

Agreement on Trade Related Intellectual Property Rights, 1994 provides for the patentable subject matter which includes invention, whether in relation to the product or process, in all fields of technology, provided they are new, involve an inventive step and capable of industrial application. Subject to Articles 65, paragraph 4 and Article 70 paragraph 8 and *paragraph 3 of this Article*, patent rights shall be available and enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced (emphasis added).<sup>11</sup> Members may exclude from patentability inventions, the prevention within

<sup>10</sup> Ravishanker A. and others, "Plant Variety Protection: Lessons from a Cross Country Perspective." *Policy Brief 11*, 2000, ICAR, New Delhi

<sup>11</sup> Article 27(1) of TRIPS Agreement

their territory of the commercial exploitation of which is necessary to protect public order or morality, including to protect human, animal or *plant life* or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by domestic law (emphasis added).<sup>12</sup> Members may also exclude from patentability the following things: a) Diagnostic, therapeutic and surgical methods for the treatment of humans or animals; b) *Plants or animals other than microorganisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes* However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system by any combination thereof. The provisions of this sub-paragraph shall be reviewed 4 years after the entry into force of the Agreement Establishing the WTO (emphasis added).<sup>13</sup>

### The Budapest Treaty, 1973

Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure<sup>14</sup> governs the recognition of deposits in officially approved culture collections for the purpose of patent applications in any country that is party to it. Because of difficulties or virtual impossibility of reproducing a microorganism from a description of it in a patent specification, it is essential to deposit a strain in a culture collection center for testing and examination by others. India's accession to the treaty was made on September 17, 2001 and came into force on December 17, 2001.<sup>15</sup>

### UPOV

Under the International Union for the Protection of New Varieties of Plants (UPOV) Act, 1991<sup>16</sup> a plant variety qualifies for protection when it meets some essential criteria, viz.: (i) Novelty, (ii) Distinctiveness, (iii) Uniformity and (iv) Stability.<sup>17</sup> The UPOV Act further goes on to describe these criteria. In the case of the condition of the novelty, a variety shall be deemed to be new, if the propagating or harvested material of the variety has not been sold or otherwise disposed of, with the consent of the breeder for the purpose of exploitation of the variety.<sup>18</sup> The variety shall be distinct, if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of filing the application.<sup>19</sup> It shall be deemed to be uniform if it is sufficiently uniform in its relevant characteristics, subject to variation that may be expected from the particular feature of its propagation.<sup>20</sup> As regard the condition of stability, the variety shall be deemed to be

<sup>12</sup> Article 27 (2) of TRIPS Agreement

<sup>13</sup> Article 27 (3) of TRIPS Agreement

<sup>14</sup> Done at Budapest on April 28, 1977, and amended on September 26, 1980, for details see [http://www.wipo.int/treaties/en/registration/budapest/trtdocs\\_wo002.html](http://www.wipo.int/treaties/en/registration/budapest/trtdocs_wo002.html) visited on April 21, 2008.

<sup>15</sup> [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=7](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=7) visited on April 21, 2008. International Depositary Authorities: Microbial Type Culture Collection and Gene Bank (MTCC) - Date status acquired: October 4, 2002.

<sup>16</sup> It is an intergovernmental organization with headquarters in Geneva (Switzerland). UPOV was established by the International Convention for the Protection of New Varieties of Plants. It was adopted in Paris in 1961 and it was revised in 1972, 1978 and 1991. [http://www.upov.int/index\\_en.html](http://www.upov.int/index_en.html) visited on April 21, 2008

<sup>17</sup> Article 5 of the UPOV 1991 Act.

<sup>18</sup> Article 6 of the UPOV 1991 Act.

<sup>19</sup> Article 7 of the UPOV 1991 Act.

<sup>20</sup> Article 8 of the UPOV 1991 Act.

stable, if its relevant characteristics remain unchanged after repeated propagation, or in case of particular cycle of propagation, at the end of each such cycle.<sup>21</sup>

### European Union

European Patents Convention, 1973 provide for single application as enough for the entire Europe. EU Directive on the Legal Protection of Biotechnological Inventions 1998<sup>22</sup> was intended to harmonize the laws of Member States regarding the patentability of biotechnological inventions, including plant varieties and human genes. Further, European Council for Regulation of Community wide system of Plant Variety Rights, 1994<sup>23</sup> is also put in place to provide better protection to the plant varieties. It established a system of Community plant variety rights as the sole and exclusive form of Community industrial property rights for new plant varieties. The system is administered by the Community Plant Variety Office (CPVO).<sup>24</sup> EPC prohibits patents for plant varieties. But, microbiological processes are patentable. 1994 law provides rights to the breeders of plant varieties and essentially derived varieties. Farmers' privilege was to be provided only through national laws. There is no scope for the protection of farmers' interests at the regional level. This shows that the European law regarding the protection of plant varieties is more tilted towards the individuals' interests of the breeders as against the collective rights of the farming society who are responsible for maintenance of the rich bio-heritage.

### New Patent Law of Russian Federation 1992

It provides for patents for inventions having the features of novelty, inventiveness and industrial application. It includes cell cultures & microorganisms. Term is 20 years. Protection of Plant Varieties is also separately provided. Plants are excluded from patent law. Law on Selection Achievements protects plant varieties. This law is based on UPOV model of the plant to be novel, distinct, uniform and stable. But the term is 35 years.<sup>25</sup>

### Andean Pact Countries of Latin America (1969)

They have established a patent regime that is based on WIPO model. All products & processes in technology are patentable. Animal species & biological procedures there for are excluded. Microorganisms & plant species are patentable. Plant Breeders' Rights are available for a variety, which is new, homogeneous, stable, generic denomination. Term is 15-25 years depending on specie. It is applicable to essentially derived varieties also. Use for non-commercial purposes is permitted. Each country should establish a national registry. Regional registry is maintained by JUNAC.<sup>26</sup>

<sup>21</sup> Article 9 of the UPOV 1991 Act.

<sup>22</sup> Directive 98/44/EC of the European Parliament and of the Council of 6<sup>th</sup> July 1998 is a European Union directive in the field of patent law, made under the internal market provisions of the Treaty of Rome. The original proposal was adopted by the European Commission in 1988. For details see [http://en.wikipedia.org/wiki/Directive\\_on\\_the\\_patentability\\_of\\_biotechnological\\_inventions](http://en.wikipedia.org/wiki/Directive_on_the_patentability_of_biotechnological_inventions)

<sup>23</sup> Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights

<sup>24</sup> [http://europa.eu/agencies/community\\_agencies\\_cpvo/index\\_en.htm](http://europa.eu/agencies/community_agencies_cpvo/index_en.htm) visited on April 21, 2008

<sup>25</sup> 19. Review of Central and East European Law 1993, No. 6, pp. 707-709.

<http://scholar.google.com/scholar?hl=en&lr=&q=info:FSFrZyFPiVYJ:scholar.google.com/&output=viewport> visited on April 21, 2008

<sup>26</sup> Thomas Andrew O'Keefe, "How the Andean Pact Transformed Itself into a Friend of Foreign Enterprise", Vol 30, No. 4, *International Lawyer*, Winter 1996, pp. 811-824

## USA

The United States provides for three types of patents. Plant varieties patents are for 20 years, Design patents are for 16 years and Utility or Regular patents, the term of which is 20 years. Patent is defined to involve any process, machine, manufacture and composition of matter, which obviously include all such things in relation to plant varieties. Plant Variety Protection is also provided independent of patent protection. It is available to sexually reproducing plant varieties also and the term of protection is 20 years. The advantages of this law are that the cost for obtaining plant variety protection as against patent is much lower, application is very simple, requirements for protection are less, and the protection provided is quite similar.<sup>27</sup> Many plant patents are registered in the US.<sup>28</sup>

## Other Countries:

Egypt provides for a term of 15 years for patents, but chemical process for food or medicine is excluded from patenting. Proposed changes in the law provide for 20 years term; Article 27 of TRIPS is incorporated; Compulsory license as outlined in TRIPS is also provided. Under the provisions of Plant Varieties Law, protection is granted to plant varieties, derived inside or outside Egypt, whether developed through biological or non-biological means, when registered in the special register of protected plant varieties.<sup>29</sup> To be eligible for protection a variety shall be new, distinct, uniform, stable and shall be subject of a denomination.<sup>30</sup> The term of protection for plant varieties shall be 25 years for trees and vines and 20 years for other crops. The term of protection shall run from the date of the grant.<sup>31</sup>

In South Africa, Patents Act 1978 provide patent for inventions, which are: 1. Novel, 2. involve inventive step, 3. used or applied in trade or industry or agriculture. It provides for 20 years term. Biotechnology patents are only 5%. Plant Breeders' Rights Act 1976 as amended in 1996 is a special law providing for protection of plant varieties. A plant variety is protected if it is: 1. Novel, 2. Distinct, 3. Uniform, 4. Stable and 5. Has distinct denomination. Term of protection is 20-25 years (15 years minimum).<sup>32</sup>

Australia has Patents Act 1990 amended in 1994 under which the term of patent is increased from 16 to 20 years. Four year possible extension for pharmaceutical patents is also provided. Plant Breeders Rights Act 1987 amended

<sup>27</sup> Plant Variety Protection Act, as amended, 7 U.S.C. 2321 *et seq.* for the full text of the Act see <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3002796>.

<sup>28</sup> The USSC affirms patent for sexually reproduced plant-corn hybrids on Dec 10, 2001. 17 patents were issued under 35 USC 101 to Pioneer Hi-Breed Inc.

<sup>29</sup> Article 189, Law on the Protection of Intellectual Property Rights, Egypt (2002, in force). Book Four, for details, see <http://www.grain.org/brl/?docid=901&lawid=1066>

<sup>30</sup> Article 192, Law on the Protection of Intellectual Property Rights, Egypt (2002, in force), Book Four

<sup>31</sup> Article 193, Law on the Protection of Intellectual Property Rights, Egypt (2002, in force), Book Four

<sup>32</sup> Plant Breeders' Rights Act No. 15 of 1976 (Assented to 15 March, 1976), (Date of Commencement: 1 November 1977) as amended by Plant Breeders' Rights Amendment Act, No. 5 of 1980. Plant Breeders' Rights Amendment Act, No. 14 of 1981, Plant Breeders' Rights Amendment Act, No. 38 of 1983, Transfer of Powers and Duties of the State President Act, No. 97 of 1986 and Plant Breeders' Rights Amendment Act, No. 15 of 1996 published in the *Government Gazette* of the Republic of South Africa, Vol. 370, No. 17138, of April 19, 1996.

in 1994 provides for protection of plant varieties for a term of 25 years for trees & vines and 20 years for other variety. Farmers' saving of seeds is allowed.

In China Patent Law 1985 (revised in 1993) provides that the first inventor can file application. Administrative Promulgation to Protect Agrochemical Products, 1993 provides for pipeline protection. But it must be eligible for protection under patent law before 1993. It must not have been marketed in China before 1993. Term of protection is only seven years.

In Japan, patents are available for inventions having industrial application, innovativeness and also for improvement. Term is 20 years. Crop Variety Protection is available for original and improvement of varieties. The term of protection is 15 years after registration. 18 years term is provided for perennials. State strategic plan for conservation of biodiversity is developed in accordance with which conservation activities are undertaken. A fixed royalty and other rights are provided.

Russia has a long tradition of disregarding IPR. Only limited rights are provided in terms of inventor's certificate of authorship. This can be freely exploited. Traditional freedom of choice is available to the inventor to get his invention protected by an inventor's certificate or by patents. Patents are extremely costly.

Costa Rica is the only country in which IPR is protected under the Constitution.<sup>33</sup> Patent is provided for a product, a machine, a tool or a process or any improvement. Requirements for patenting are novelty, non-obviousness and utility. Exclusive right to exploit and give license to other interested persons are vested with the owner of the patent. Plant varieties, animals, biological process and microbiological process are excluded from the patent regime. Term of the patent is 12 years and only one year for food, etc. It became TRIPS member in 1994. Change proposed to be made in existing law is met with controversy.

In Mexico a defensive IPR system is provided under the 1976 Act. Ten years term is provided. Following types are excluded from patenting, i.e. chemical products, technologies and food. Exploitation of patent is obligatory. Aggressive compulsory license system is provided. 1987 law provides for 10-14 years term (10 years for chemical and biotechnology patents). 1994 Amendment as per TRIPS provides for 20 years term. Federal Plant Variety Law 1996 is legislated to protect the plant varieties. The term is 18 years for perennials and 15 years for others. Requisites for the protection are that the variety should be new, distinct, stable, homogeneous and has distinct denomination. Emergency licenses are made available. Ministry of Agriculture is the authority to deal with the matters concerning plant variety protection.

### **Indian Aspects: The Protection of Plant Varieties and Farmers Rights Act, 2001**

In order to provide for the establishment of an effective system for protection of plant varieties, the rights of farmers and plant breeders and to encourage the development of new varieties of plants the Protection of Plant Varieties and Farmers Rights Act, 2001 is passed in India.<sup>34</sup> It has also been considered necessary to recognize and protect the rights of the farmers in respect of their contribution made at any time in conserving, improving and making available plant genetic resources for the development of the new plant varieties. Moreover to accelerate agricultural

<sup>33</sup> Article 47

<sup>34</sup> Act No. 53 OF 2001 [30th October, 2001] published in *The Gazette of India Extraordinary*, Part II, Section 1, No. 64, New Delhi, October 30, 2001

development, it is necessary to protect plants breeders' rights to stimulate investment for research and development for the development of new plant varieties. Such protection is likely to facilitate the growth of the seed industry which will ensure the availability of high quality seeds and planting material to the farmers. Keeping these objectives as the basis this law is enacted in India.<sup>35</sup>

**The Protection of Plant Variety Authority:** It is established under this legislation for the purpose of promoting and encouraging development of new varieties of plants and protecting the rights of farmers and breeders.<sup>36</sup> It consists of a Chairperson and fifteen members.<sup>37</sup> General functions of the Authority are as under:

1. To promote and encourage development of new varieties of plants and to protect the rights of the farmers and breeders.
2. Registration of extant new varieties.
3. Developing characterisation and documentation of registered varieties.
4. Documentation, indexing and cataloguing of farmers' varieties.
5. Compulsory cataloguing for all varieties of plants.
6. Ensuring that registered seeds are available to farmers.
7. Collection of statistics of plant varieties.
8. Ensuring maintenance of register.<sup>38</sup>

**Registerable Varieties:** Section 15 provides for the varieties that are registerable under the Act. They are as under: 1. *A new variety*: It must possess the qualities of novelty, distinctiveness, uniformity and stability. 2. *An extant variety*: It must possess the qualities of distinctiveness, uniformity and stability.<sup>39</sup> 3. *Essentially Derived Variety*. Definition of Extant Variety is laid down in Section 2(j) of the act to include all such varieties that are notified under S. 5 of Seeds Act 1966; farmers' variety; Variety of common knowledge; and Variety in public domain.<sup>40</sup>

**Who can apply?:** The following persons are entitled to apply for the registration of plant varieties: Breeder of the variety; Successor of the breeder; Assignee of the breeder; Farmer or group of farmers or community of farmers as breeder; Person authorised by any of the above; and University or publicly funded agricultural institution as breeder.<sup>41</sup>

**What the form shall contain?:** The application should contain the following information: A single and distinct denomination to a variety; Affidavit that it contains no terminator technology; Complete passport data of parental line, geographical

<sup>35</sup> These objectives can be ascertained by reading the objectives clauses appearing at the beginning of the Act.

<sup>36</sup> It is located at NASC Complex, DPS Marg, Opp- Todapur, New Delhi-110 012.

<sup>37</sup> For the details of the composition of the Authority, see Article 3 of the Protection of Plant Varieties and Farmers Rights Act, 2001

<sup>38</sup> Section 8 of the Protection of Plant Varieties and Farmers Rights Act, 2001

<sup>39</sup> General Guidelines for the examination of Distinctness, Uniformity and Stability and the development of harmonized descriptions were framed by Protection of Plant Varieties and Farmers' Rights Authority, Department of Agriculture and Cooperation, Government of India, NASC Complex, IARI, New Delhi-110012, 32pp. Copyright© Registrar, PPV & FRA, Government of India, New Delhi First Print 500 copies August 2006 Published by Registrar, PPV & FRA, on behalf the, Chairperson, PPV & FR Authority, New Delhi - 1100 12

<sup>40</sup> Section 2(j) of the Protection of Plant Varieties and Farmers' Rights Act, 2001 defines "extent variety" as a variety available in India which is - (i) notified under section 5 of the Seeds Act, 1966; or (ii) farmers' variety; or (iii) a variety about which there is common knowledge; or (iv) any other variety which is in public domain;

<sup>41</sup> Section 16 of the Protection of Plant Varieties and Farmers' Rights Act, 2001

location, contribution of farmer, community, etc; Brief description of the variety; and Declaration as to legal acquisition of genetic material or parental material.<sup>42</sup> The applicant must observe the tenets of the following guidelines:

1. Every application in triplicate must be in writing and signed by the applicant or their representative. Application should be submitted in hard copy only along with all essential requirements by hand till further notice.
2. Applications will be received only on Monday to Thursday from 10.00 hours to 15.00 hours. No application will be accepted on Friday, Saturday, Sunday and public holidays.
3. Every application must have the name of the applicant, their address and nationality as well as the address of service of their agent (if applicable).
4. A person can file up to a maximum of three applications per day.
5. Until otherwise notified in the Plant Variety Journal of India, each application should be accompanied with an application charge of Rs. 200/- each by demand draft drawn in favour of "The Registrar, Plant Variety Registry, New Delhi".
6. The application will be received on "first come, first serve" basis.
7. No applications will be received after business hours.
8. On successful submission of application, the applicant will receive an acknowledgment slip.
9. After submission of application, it will be processed according to the provisions of the Rule 29(2) of the PPV & FR Rules, 2003.
10. After depositing the stipulated fees for conducting DUS tests, the office of the Registrar shall issue receipt and number which shall be used for all future references including the checking of the status of application on line.
11. Seed samples for DUS testing must be submitted in the months as notified in the schedule given.<sup>43</sup>

**Defective denomination of a new variety:** Denomination of the variety is a very important aspect and has to be carefully formulated. A denomination would be considered as defective on the following grounds:

1. It is not capable of identifying such variety.
2. It consists solely of figures.
3. It is liable to mislead or to cause confusion concerning the characteristics, value identity to such variety of the identity of breeder of such variety.
4. It is not different from every denomination which designates a variety of the same botanical species or of a closely related species registered under this Act.
5. It is likely to deceive the public or cause confusion in the public regarding the identity of such variety.
6. It is likely to hurt the religious sentiments respectively of any class or section of the citizens of India.
7. It is prohibited for use as a name or emblem for any of the purposes mentioned in section 3 of the Emblems and Names (Prevention of Improper Use) Act, 1950.
8. It is comprised of solely or partly of geographical name.<sup>44</sup>

<sup>42</sup> Section 18 of the Protection of Plant Varieties and Farmers' Rights Act, 2001

<sup>43</sup> Guidelines for submission of application for registration of plant varieties as per the requirement of Section 15 of the PPV & FR Act, 2001 read with Rule 6 and Rule 23 of PPV & FR Rules, 2003, *Plant Variety Journal of India*, Vol.-1, No.-2

April 02, 2007, pp. 8-9

<sup>44</sup> Section 15(4) of the Protection of Plant Varieties and Farmers' Rights Act, 2001

**Procedure for registration:** Application along with fee and documents should be filed in the office of the Authority. Tests to evaluate the variety shall be conducted.<sup>45</sup> The following general recommendations shall be applicable for all the crops listed in the document, in addition to the management practices specific to each crop:

1. The experimental field for DUS trials should not be near a building, compound wall, a shady tree, etc.
  2. Pre-sowing/ pre-planting tillage to create optimal tilth for germination and pre-planting establishment depending on crop and soil.
  3. Seed rate as per guidelines for trials in DUS centres.
  4. For irrigated crops initial irrigation must be provided either as pre-sowing or post-sowing to facilitate germination and establishment.
  5. For crops grown under rainfed conditions, life saving/protective irrigation may be provided, if necessary.
  6. Principles of crop rotation must be followed to avoid over exploitation of soil fertility, build-up of pests, diseases, weeds, etc.
  7. For crops other than rice, it should be ensured that anaerobic conditions do not prevail in the experimental field.
  8. DUS trials should not be conducted in problematic soils.
  9. Removal of stubbles of previous crop is mandatory to prevent possible allelopathic effect on succeeding crop.
  10. If agro-chemicals other than fertilizer are to be used, based on advice from specialists the level, time and method of application must be such as to prevent any toxic residual effect on succeeding crop.
  11. A weed free condition during the critical period of crop-weed competition for each crop must be ensured through manual/mechanical means. Only in extreme situations, the use of herbicides may be contemplated in consultation with a specialist.
  12. Sufficient measures must be taken to protect the crop from bird damage and wild animals.
  13. Harvesting and processing of economic produce must be done at optimal grain moisture content to prevent cracking, deterioration during storage and pest / disease damage.
  14. All external inputs other than those mentioned under "Essential agronomic practices" must be avoided.
  15. Harvesting of produce must be avoided from lodged plants, plants affected by pest/disease, premature plants, abnormal plants and fields heavily infested with weeds.
  16. After harvest of grain or other economic produce, the crop residues should be properly taken care of. If possible, it should be shifted to compost pits. In case the compost is not produced at the farm, the residues (left over biomass) should be carefully incinerated.<sup>46</sup>
- The following centres have been identified provisionally for the DUS Testing by the Authority:

<sup>45</sup> A number of Specific Guidelines have been developed and there are continual additions, an up-to-date list of which is provided in the "List of Guidelines Adopted by PPV&FRA in 2006" (Annexure II), Plant Variety Journal of India Volume 1, No. 1, p. 152

<sup>46</sup> Model Agronomic Practices for the conduct of Distinctiveness, Uniformity and Stability tests for twelve notified crops and General recommendations for all crops, see *Plant Variety Journal of India*, Vol.-1, No.-2 April 02, 2007, pp. 47-48

**Table 2: DUS Testing Centres**

<b>Crop</b>	<b>Dus Test Centers</b>
Rice	1) DRR, Hyderabad 2) CRRI, Cuttack 3) IARI, Karnal
Maize	1) DMR 2) VPKAS, Almora 3) ANGRAU, Hyderabad 4) RAU, Dholi
Pearlmillet	1) MPKV, Rahuri 2) Mandore (PC)
Mungbean	1) IIPR, Kanpur 2) ANGRAU, Hyderabad
Fieldpea	1) IIPR, Kanpur 2) JNKVV, Jabalpur
Lentil	1) IIPR, Kanpur 2) JNKVV, Jabalpur
Mustard	1) NRCRM, Bharatpur 2) HAU, Hisar
Soybean	1) VPKAS, Almora 2) NRCS, Hyderabad 3) UAS, Dharwad
Safflower	1) DOR 2) PKV, Akola
Sesame	1) JNKVV, Jabalpur 2) RAU, Durgapur
Cotton	1) CICR, Nagpur 2) UAS, Dharwad 3) HAU, Hisar 4) CICR, Coimbatore
Lucerne	1) IGFR, Jhansi 2) MPKV, Rahuri
Tomato	1) IIVR 2) IIHR
Okra	1) IIVR 2) IIHR
Cabbage	1) IIVR 2) IARI, Katrain
Onion	1) IIVR 2) NRC
Rose	1) IIHR 2) IARI, New Delhi
Wheat	1) DWR, UAS, Dharwad 2) IARI, Indore 3) CSUAT, Kanpur
Sorghum	1) NRCS, Hyderabad 2) MPKV, Rahuri 3) GBPUA&T, Pantnagar 4) HAU, Hisar
Chickpea	1) IIPR, Kanpur 2) MPKV, Rahuri 3) HAU, Hisar
Urdbean	1) IIPR, Kanpur 2) TNAU, Coimbatore
Rajmash	1) IIPR, Kanpur 2) VPKAS, Almora
Pigeon pea	1) IIPR, Kanpur 2) PKV, Akola 3) TNAU, Coimbatore
Groundnut	1) NRCG 2) TNAU, Coimbatore
Sunflower	1) DOR 2) TNAU, Coimbatore
Castor	1) DOR 2) TNAU, Coimbatore
Linseed	1) JNKVV, Jabalpur 2) CSAUA&T, Kanpur
Jute	1) CRIJAF, Barrackpore Bud Bud
Berseem	1) IGFR, Jhansi 2) PAU, Ludhiana
Brinjal	1) IIVR 2) IIHR
Cauliflower	1) IIVR 2) IARI, Katrain
Potato	1) CPRI, Shimla 2) CPRI, Modipuram
Garlic	1) IIVR 2) NRC
Chrysanthemum	1) IIHR 2) IARI, New Delhi

After the conduct of tests the acceptance or rejection or amendment of the application is done. Acceptance of the application may be absolute or conditional.<sup>47</sup> Advertisement of application is made after it is accepted.<sup>48</sup> Opposition can be made by the interested parties on the following grounds: (a) that the person opposing the application is entitled to the breeder's right as against the applicant; or (b) that the variety is not registrable under this Act; or (c) that the grant of certificate of registration may not be in public interest; or (d) that the variety may have adverse effect on the environment. Hearing will be conducted as to the opposition if there is opposition to the application. Registration and issue of certificate is finally done after completing the procedures described above.<sup>49</sup>

**Duration registration:** The registration is valid for nine years in the case of trees and vines and six years in the case of other crops and may be reviewed and renewed for the remaining period on payment of such fees as may be fixed by the rules made in this behalf subject to the condition that the total period of validity shall not exceed, (i) in the case of trees and vines, eighteen years from the date of registration of the variety; (ii) in the case of extant variety, fifteen years from the date of the notification of that variety by the Central Government under section 5 of the Seeds Act, 1966; and (iii) in other cases, fifteen years from the date of registration of the variety.<sup>50</sup> Duration of plant variety protection can be is shown in the tabular form below:

**Table 3: Term of Plant Variety Protection**

Sl No	Type	Total Period	Renewal
01	Trees & Vines	18 years	9 years
02	Extant Varieties	15 years	6 years
03	Others	15 years	6 years

**Rights conferred on breeders:** Breeders are conferred with the exclusive right to produce, sell, market, distribute, import or export the variety. They also have the right to authorise any person to produce, sell, market, or otherwise deal with the variety. But the authorization so given is not further transferable. Registrar may vary terms of the protection by taking into consideration the relevant factors for that purpose. The Registrar may also cancel terms.<sup>51</sup>

**Revocation:** Plant variety protection can be revoked on any of the following grounds:

1. Grant is based on incorrect information.
2. Granted to ineligible persons.
3. Breeder's failure to provide required information, documents or material.
4. Breeder's failure to provide an alternative denomination of the variety when required.
5. Breeder's failure to provide seeds or propagating material to compulsory licensee.
6. Breeder's failure to comply with provisions of the Act, rules or regulations.

<sup>47</sup> Section 20 of the Protection of Plant Varieties and Farmers' Rights Act, 2001

<sup>48</sup> Section 21 of the Protection of Plant Varieties and Farmers' Rights Act, 2001

<sup>49</sup> Section 22 of the Protection of Plant Varieties and Farmers' Rights Act, 2001. There is a separate procedure for essentially derived varieties under Section 23 of the Protection of Plant Varieties and Farmers' Rights Act, 2001

<sup>50</sup> Section 24 (6) of the Protection of Plant Varieties and Farmers' Rights Act, 2001

<sup>51</sup> Section 28 of the Protection of Plant Varieties and Farmers' Rights Act, 2001

## 7. Grant is not in the public interest.<sup>52</sup>

**Appellate Tribunal:** Appellate Tribunal is sought to be established to hear appeals from the following orders: registration of a variety, registration of an agent or licensee, claim of benefit sharing, revocation or modification of compulsory license and payment of compensation.<sup>53</sup>

**Remedies:** Following civil remedies are available to the right holders: 1. Injunction: it may be inter-locutory or permanent, 2. Damages, 3. Share of profits.<sup>54</sup> There are certain criminal remedies also available. False application of denomination is punishable with 3 months to 2 years rigorous imprisonment and fine of Rs 50000-5 lakh. Unauthorised selling of varieties is punishable with 6 months to 3 years rigorous imprisonment and fine of Rs 50000-5 lakh. Falsely representing registered variety is punishable with 6 months to 3 years rigorous imprisonment and fine of Rs.1-5 lakh. For subsequent offences punishment is 1-3 years rigorous imprisonment and fine of Rs.2-20 lakh.<sup>55</sup>

## Limitations of the Legal Protection of Plant Varieties

The Protection of Plant Varieties and Farmers Rights Act is an evenly balanced document. It not only provides monopoly rights on plant varieties but also takes care of the collective interests of the community as a whole. Further, the rights provided under this law are not absolute. They are subject to many limitations. Important ones are highlighted under this part.

**1. Benefit sharing:** The Authority is empowered to issue order for benefit sharing, after taking into consideration the extant and nature of the use of genetic material of the claimant in the development of the variety relating to which the benefit sharing has been claimed and the commercial utility and demand in the market of the variety relating to which the benefit sharing has been claimed. The amount of benefit sharing to a variety determined shall be deposited by the breeder of such variety in the National Gene Fund. The amount of benefit sharing determined by the Authority is recoverable as an arrear of land revenue by the District Magistrate within whose local limits of jurisdiction the breeder liable for such benefit sharing resides.<sup>56</sup>

**2. Exclusion of certain varieties:** No registration of a variety is allowed if the prevention of commercial exploitation of such variety is necessary to protect public order or public morality or human, animal and plant life and health or to avoid serious prejudice to the environment. The Central Government will the genera or species.<sup>57</sup>

**3. Researcher's rights:** Researchers are entitled to use any registered variety for conducting experiment or research. The use can also be made of a registered variety by any person as an initial source of variety for the purpose of creating other varieties. The authorization of the breeder of a registered variety is required where the repeated use of such variety as a parental line is necessary for commercial production of such other newly developed variety.<sup>58</sup>

<sup>52</sup> Section 34 of the Protection of Plant Varieties and Farmers' Rights Act, 2001

<sup>53</sup> Chapter VIII of the Protection of Plant Varieties and Farmers' Rights Act, 2001

<sup>54</sup> Section 66 of the Protection of Plant Varieties and Farmers' Rights Act, 2001

<sup>55</sup> See sections in the part Offences, Penalties and Procedure in Chapter X of the Protection of Plant Varieties and Farmers' Rights Act, 2001

<sup>56</sup> Section 24 (2) and 26 of the Protection of Plant Varieties and Farmers' Rights Act, 2001

<sup>57</sup> Section 29 of the Protection of Plant Varieties and Farmers' Rights Act, 2001

<sup>58</sup> Section 30 of the Protection of Plant Varieties and Farmers' Rights Act, 2001

**4. Farmers' Rights:** Certain rights are given to the farmers in recognition of their contribution to the maintenance of the rich biological resources.<sup>59</sup> These rights are discussed separately.

**5. Community Rights:** Village or local community responsible for evolution of any plant variety is entitled for compensation from the plant breeder.<sup>60</sup>

**6. Compulsory License:** Authority is entitled to issue compulsory licence after three years of grant of exclusive rights to the breeder if reasonable requirements of the public are not satisfied and if the concerned variety is not available to the public at reasonable price. Consultation with the Central Government is required to be made before issuing compulsory licence. Terms & conditions & duration of license are to be determined by Authority. Authority can modify or revoke license.<sup>61</sup>

## FARMERS' RIGHTS

An Australian legal expert, Professor Sherman, claims that patents on GM crops threaten the property rights of farmers. He was referring to a recent court case in which Monsanto successfully sued a Canadian farmer, Percy Schmeiser, for growing the company's GM canola on his land without authorisation. Mr Schmeiser maintains that he did not deliberately plant the Monsanto Roundup Ready canola, and is not sure how the plants came to be on his land. But the court found that according to patent law principles, this was not relevant to the case. While seeds or pollen blown onto a farmer's land would normally be considered their property, the court ruled that this was not the case with patented GM plants. It said Mr Schmeiser was liable because the GM canola was grown and sold along with the rest of his crop. This case has caused a furore in the legal world. Even though people accepted Schmeiser might not have planted the GM canola deliberately, he was still sued for "passive" infringement of the company's patented seed. The decision has ranked the intangible intellectual property rights of Monsanto above the tangible property rights of Mr Schmeiser. Most decisions on patent laws have been in favour of the intellectual property owner - the outcome of the Napster case was classic in this respect.<sup>62</sup> New biotechnologies are termed as limiting the farmers' rights. Terminator technology is a direct assault on farmers and indigenous cultures and on food sovereignty. It threatens the well-being of all rural people, primarily the very poorest.<sup>63</sup> So is the case with a variety of genetically modified crops.

The concept of Farmers' Rights provides a measure of counterbalance to "formal" Intellectual Property Rights and patents that compensate for the latest innovations with little consideration of the fact that, in many cases, these innovations are only the most recent step of accumulative knowledge and inventions that have been carried out over millennia by generations of men and women in different parts of the world. As men and women farmers' knowledge, skills and practices contribute to the conservation, development, improvement, and management of Plant Genetic Resources (PGR), their different contributions should be recognized and respected by

<sup>59</sup> Section 39 of the Protection of Plant Varieties and Farmers' Rights Act, 2001

<sup>60</sup> Section 41 of the Protection of Plant Varieties and Farmers' Rights Act, 2001

<sup>61</sup> Chapter VII of the Protection of Plant Varieties and Farmers' Rights Act, 2001

<sup>62</sup> <http://www.abc.net.au/science/news/stories/s342557.htm> visited on April 21, 2008

<sup>63</sup> <http://www.banterminator.org/The-Issues/Peasants-and-Small-Scale-Farmers/Terminator-Technology-and-Farmer's-Rights>

the International Undertaking, particularly in terms of Farmers' Rights.<sup>64</sup> Farmers' Rights are defined as "rights arising from the past, present and future contribution of farmers in conserving, improving and making available plant genetic resources, particularly those in the centres of origin/diversity." The purpose of these rights is stated to be "ensuring full benefits to farmers and supporting the continuation of their contributions."<sup>65</sup>

FAO Conference endorsed the concept of Farmers Rights with a view to ensuring global recognition of the need for conservation and the availability of sufficient funds for these purposes; assisting farmers and farming communities throughout the world, especially those in areas of original diversity of plant genetic resources, in the protection and conservation of their PGR and of the natural biosphere; and allowing the full participation of farmers, their communities and countries in the benefits derived, at present and in the future, from the improved use of PGR.<sup>66</sup> During the 26th Session of the FAO Conference, it was also adopted unanimously by over 170 countries, endorsing that nations have sovereign rights over their plant genetic resources; breeders' lines and farmers' breeding material should only be available at the discretion of their developers during the Grind of development; and Farmers Rights will be implemented through an international fund on PGR which will support PGR conservation and utilization programmes, particularly, but not exclusively, in the developing countries.<sup>67</sup>

After seven years of negotiations, the FAO Conference<sup>68</sup> adopted the International Treaty on Plant Genetic Resources for Food and Agriculture, in November 2001. This legally-binding Treaty covers all plant genetic resources relevant for food and agriculture. It is in harmony with the Convention on Biological Diversity. The Treaty recognizes the enormous contribution that farmers and their communities have made and continue to make to the conservation and development of plant genetic resources. This is the basis for Farmers' Rights, which include the protection of traditional knowledge, and the right to participate equitably in benefit-sharing and in national decision-making about plant genetic resources. It gives governments the responsibility for implementing these rights.<sup>69</sup>

### **Indian Aspects of Farmers' Rights**

India is a home to 45,000 plant species and 75,000 animal species. Ninety per cent of the world's biological resources emanate from the underdeveloped regions of Asia and Africa. Yet, MNCs hold 97 per cent of all patents worldwide. In the past 15 years, 10,778 patents on plants were registered in the US alone. At the World Intellectual Property Organisation, patent applications went up from 3,000 in 1979 to 67,000 in 1997. Countries such as India are at the losing end of the new patent regime. According to the US-based Rural Advancement Foundation International, if

<sup>64</sup> Sally E. Bunning and Catherine L.M. Hill, "Farmers rights in the conservation and use of plant genetic resources: A Gender Perspective", <http://www.fao.org/docrep/X0255E/x0255e08.htm> visited on April 20, 2008

<sup>65</sup> This definition is given as an annex to the International Undertaking on Plant Genetic Resources (unanimously adopted through Conference Resolution 8/83) the Conference Resolution 5/89

<sup>66</sup> Extract of the Twenty-Fifth Session of the FAO Conference, Rome, 11-29 November 1989

<sup>67</sup> Resolution 3/91

<sup>68</sup> Resolution 3/2001

<sup>69</sup> <http://www.fao.org/ag/cgrfa/itpgr.htm> visited on April 23, 2008

contributions of peasants and tribal people from the developing world are taken into account, the US will owe as much as \$2.7 billion to the developing countries.<sup>70</sup>

There are innumerable cases of bio piracy in terms of patents which affect the Indian farmers. Important ones are listed here under:

**Turmeric Patent:** The turmeric patent granted to the University of Mississippi in 1995 has been successfully challenged by CSIR in 1997 as prior art. It provided 32 references from ancient texts to show prior knowledge on the use of turmeric as powder. Even its continuation in respect of surgical wounds as antiseptic is rejected as prior art after knowing of its use on umbilical cord & recording of the same by a Hakim in Akbar's period

**Neem Patents:** There are more than 40 patents, mainly for Neem pesticides, held by laboratories in U.S.A. & U.K. A U.S. company, W.R. Grace, was granted a patent for Neem as a pesticide. India could not challenge it because the patent was for a formulation, which increased the shelf life of the Neem extract. India has granted more than 80 patents on Neem.

**Basmati Patent:** In September 1997, Ricetec obtained a patent for calling aromatic rice grown outside India as Basmati & selling it under any brand name. Ricetec has already been selling brands like Kasmati & Texmati claimed to be Basmati type rice. With the patent it will be able to label its exports of rice also as Basmati. It claimed that basmati is a generic term and that it had invented certain novel basmati lines and grains which make possible production of high quality, high yielding basmati rice worldwide. It claimed to have isolated specific scientific parameters like length-width ratio, starch index, percentage increase on being cooked, etc.

**Diabetes Patent:** Cromak Research Inc. was granted patent by USPTO for a medicine prepared by using extracts from Jamun, Karela, Gurmar and Brinjal to cure diabetes.<sup>71</sup>

**Methi Patent:** Kripal S. Dahliwal obtained patent on methi in March 1999.<sup>72</sup>

**Jute Patent:** "The United Kingdom has granted a patent to Geohess(U.K.) Ltd. on October 25, 1995 on Jute as an environmentally friendly packaging material." The EPO has also granted the patent over Hessian, a variety of jute cloth used for packaging and as land cover. India has won the battle in August 2004 before the Europa Patents Office. Appeal period lapsed on October 11, 2004. Consequent upon the cancellation of the patent, Indian exports of Hessian to Europe increased enormously. It was 86000 tonnes in 1999-2000 and came down to 51000 tonnes in 2001-2002 and again increased to 1.42 lakh tonnes in 2003-2004 due to cancellation of the jute patent. Now jute manufacturers will be able to export Hessian without having to pay any royalty to GEOHESS. A partial victory was wrested by JMDC from the Brazilian Government, after 12-year long battle on termination and reduction of dumping duty on import of jute bags from India in September 2004.<sup>73</sup>

**BT Cotton:** In 1992, Agracetus Inc. got a patent on all forms of genetically engineered cotton, no matter what technique or genes used to create them. It was challenged in court and USPTO revoked it 1994. Recently the Government of India has cleared Bt. Cotton in spite of the controversy it has created as to its hazards on

<sup>70</sup> T. C. A. Ramanujam and T. C. A. Sangeetha, New IPR regime -- Protection for Indian patents  
<sup>71</sup> Patent No.5900240 of 1999

<sup>72</sup> Patent No. 5886029

<sup>73</sup> *The Hindu*, October 12, 2004, P.16

environment. Mahico-Monsanto Company has been selling these seeds in India indiscriminately. Recently Warangal District Administration has asked the Company to compensate farmers for the loss of yield due to the use of defective Bt Cotton seed supplied by the Company. The loss is estimated as 3.3 crores of rupees.<sup>74</sup>

**Tur Dal Patent:** The USPTO has granted three patents, Nos 6,410,596, 6, 541,522, 6,542,511 to the \$ 109-million bio-pharmaceutical company Insmmed Inc, based in Richmond in Virginia. The patents are for its novel invention of pigeon pea extracts. Following deceases can be treated from the pigeon pea extracts: 1.Diabetes, 2.Hypoglycemia, 3.Obesity, 4.Arthero-sclerotic cardiovascular disease (clogged arteries). The pigeon pea extracts by means of traditional process contain a myriad of naturally occurring organic compounds that may interfere with medicinal effects. That impurity can result in an effective amount, i.e. too low a concentration, or a toxic amount, too high a concentration, of active compound administered.<sup>75</sup>

**Ngali Nut Patent:** Australian entrepreneur, Queslander Peter Hill, is awarded for using ngali nut oil for treating arthritis. Ngali nut trees are grown in on the Salomon Islands, Vanuatu, Papua New Guinea and the Philippines. One of its varieties is grown in South India.<sup>76</sup>

**Ashwagandha Patent:** A method of treating degenerative musculoskeletal diseases such as rheumatoid arthritis & osteoarthritis in an animal, typically a human, comprises administering to the animal, typically enterally, in a convenient dosage form, a therapeutically effective amount of the beneficiated extracts of the plants Ashwagandha. Sallai Gulful, Turmaric and Ginger in a predetermined proportion relative to each other with or without other biologically active inorganic ingredients, such as zinc sulphate." Novel process of Ashwagandha includes the following: Cleaning the roots, Particulating the roots, subjecting it to distillation, cooking the steam-treated particulated mass in a polar solvent, filtering and evaporating thrice to obtain A, B & C fractions, Homogeneously mixing the volatile fraction with A,B,C fractions from the particulated mass to obtain a benefacted plant extract.

Since 1991, Navdanya has organized farmers through the Bija Satyagraha Movement to keep seed in farmer's hand and to not cooperate with IPR Laws that make seed a corporate monopoly and make seed saving and seed sharing a crime. Under the Bija Satyagraha campaign, Navdanya / RFSTE along with other several organizations, as part of this campaign, achieved a major victory when seed giant Syngenta tried to grab Dr. Richharia's precious collection of over 22,972 rice germplasms. The biotech giant had signed a MoU with the Indira Gandhi Krishi Vishwavidyalaya in order to have access to the priceless collection of rice diversity. Giant seed companies like Monsanto-Mahyco-Cargill Seeds, Pro-Agro, Novartis, Aventis, monopolise the seed and seek to criminalise seed saving and exchange by farmers.<sup>77</sup> There is a considerable opposition to the back door policy of Indian Government regarding Indo-US Agriculture Agreement. The US-India Agreement on

<sup>74</sup> *The Hindu*, March 6, 2005

<sup>75</sup> <http://www.organicconsumers.org/Patent/pigeon-pea.cfm>

<sup>76</sup> Patent No. 6,395,313

<sup>77</sup> In 1993 half a million farmers participated in Bija Satyagraha rally at Bangalore's Cubban Park. In March 1999, Navdanya reasserted the Bija Satyagraha Movement with over 2500 groups to defend farmers' rights and seed freedom in the face of bio piracy and seed monopolies. In September 2000, over 400 farmers from all over the world came together at the unique Beej Panchayat (People's Seed Tribunal) to give evidence of the crisis of seed and agriculture in the wake of globalization that is pushing small farmers to suicide.

Agriculture is described as a cut-throat manoeuvre and the US multinationals will teach Indian scientists on the type of technology India needs, and they will be obliged to work at the dictates of multinationals. This agreement is fraught with the lurking danger that these American multinationals will get access to our Germ Plasm Bank of indigenous crop varieties and get them patented in their names. Indian Agricultural Universities, K.V.Ks and Research Centres will act as extension agencies to promote the technologies of American multinationals.<sup>78</sup>

A Charter of Farmers' Rights was drawn up by leaders of farmers' organisations as well as environmental, health and consumer groups participating in a consultation workshop on Biodiversity, Farmers' Rights and Intellectual Property Rights.<sup>79</sup> The rights include right to land, right to conserve, reproduce, and modify seed and plant material, right to feed and save the country, right to just agricultural prices and public support for sustainable agriculture, right to information, right to participatory research, right to natural resources and right to safety and health.<sup>80</sup> Institutions such as ICRISAT adhere to the principles contained in the Convention on Biological Diversity, the FAO-CGIAR Agreement on Genetic Resources, and FAO International Undertaking of Plant Genetic Resources for Food and Agriculture and use material transfer agreements (MTAs) and germplasm acquisition agreements to facilitate access and ensure continued free exchange of genetic materials and bio-control agents.<sup>81</sup>

### **Farmer's Rights under the Protection of Plant Varieties and Farmers Rights Act 2001**

All the above mentioned movements and efforts yielded fruits in the form of inclusion of farmer's rights in the Protection of Plant Varieties and Farmers Rights Act 2001. The most unique part of the Protection of Plant Varieties and Farmers Rights Act 2001 is that it not only provides monopoly rights to the breeders of new varieties of plants, but at the same time it also protects the farmers from unreasonable exploitation from such monopoly holders by giving them certain important rights. Following rights are available to the farmers under various provisions of the Protection of Plant Varieties and Farmers' Rights Act, 2001:

1. **Farmers are entitled to register a new variety:** A farmer who has bred or developed a new variety shall be entitled for registration and other protection in like manner as a breeder of a variety under this Act.<sup>82</sup>
2. **Farmer's variety can be registered:** The farmers' variety shall be entitled for registration if the application contains declaration as specified in clause (h) of sub-section (1) of section 18.<sup>83</sup>

<sup>78</sup> Dr. Krishan Bir Chaudhary. "Agricultural Policies Impact on Indian Farmers". June .02. 2007. [http://www.thesouthasian.org/archives/2007/agricultural\\_policies\\_impact\\_o.html](http://www.thesouthasian.org/archives/2007/agricultural_policies_impact_o.html) visited on April 23, 2008

<sup>79</sup> The Charter of Farmers' Rights was drawn up by the leaders of different farmers' organisations in India together with representatives of social groups that participated in the National Consultation on Biodiversity, Farmers' Rights and IPRs. It was organised by the Research Foundation for Science, Technology and Natural Resources Policy and the Indian Trust for Art and Cultural Heritage in Delhi on 6 March 1993.

<sup>80</sup> <http://www.agobservatory.org/library.cfm?refID=29551> visited on April 23, 2008

<sup>81</sup> International Crops Research Institute for the Semi-Arid Tropics, [webmaster-icrisat@cgiar.org](mailto:webmaster-icrisat@cgiar.org)

<sup>82</sup> Section 39 (1) (i) of the Protection of Plant Varieties and Farmers' Rights Act, 2001

3. **Recognition and reward is given to farmers for conservation of genetic resources:** A farmer who is engaged in the conservation of genetic resources of land races and wild relatives of economic plants and their improvement through selection and preservation shall be entitled in the prescribed manner for recognition and reward from the Gene Fund, provided that material so selected and preserved has been used as donors of genes in varieties registrable under this Act.<sup>84</sup>
4. **Farmers are entitled to save, use, sow, resow, exchange, share or sell his produce including seed of protected variety:** A farmer shall be deemed to be entitled to save, use, sow, resow, exchange, share or sell his farm produce including seed of a variety protected under this Act in the same manner as he was entitled before the coming into force of this Act. But the farmer shall not be entitled to sell branded seed of a variety protected under this Act.<sup>85</sup>
5. **Farmers enjoy the right to receive compensation if propagating material supplied by the plant breeder fails to provide required performance:** Where any propagating material of a variety registered under this Act has been sold to a farmer or a group of farmers of any organization of farmers, the breeder of such variety shall disclose to the farmer or the group of farmers or the organization of farmers, as the case may be, the expected performance under given conditions, and if such propagating material fails to provide such performance under such given conditions, the farmer or the group of farmers or the organization of farmers, as the case may be, may claim compensation in the prescribed manner before the Authority and the Authority, after giving notice to the breeder of the variety and after providing him an opportunity to file opposition in the and after providing him an opportunity to file opposition in the prescribed manner and after hearing the parties, may direct the breeder of the variety to pay such compensation as it deems fit, to the farmer or the group of farmers or the organization of farmers, as the case may be.<sup>86</sup>
6. **Farmers are protected against Innocent infringement of breeder's rights:** A right established under this Act shall not be deemed to be infringed by a farmer who at the time of such infringement was not aware of the existence of such right. A relief which a court may grant in any suit for infringement referred to in section 65 shall not be granted by such court, nor any cognizance of any offence under the Act shall be taken, for such infringement by any court against a farmer who proves, before such court, that at the time of the infringement he was not aware of the existence of the right so infringed.<sup>87</sup>
7. **Farmers are exempted from registration fee:** A farmer or group of farmers or village community shall not be liable to pay any fees in any proceeding before the

<sup>83</sup> Section 39 (1) (ii) of the Protection of Plant Varieties and Farmers' Rights Act, 2001. Section 18 (1) (h) stipulates that the application shall contain a declaration that the genetic material or parental material acquired for breeding, evolving or developing the variety has been lawfully acquired

<sup>84</sup> Section 39 (1) (iii) of the Protection of Plant Varieties and Farmers' Rights Act, 2001

<sup>85</sup> "Branded seed" means any seed put in a package or any other container and labelled in a manner indicating that such seed is of a variety protected under this Act.

<sup>86</sup> Section 39 (2) of the Protection of Plant Varieties and Farmers' Rights Act, 2001

<sup>87</sup> Section 42 of the Protection of Plant Varieties and Farmers' Rights Act, 2001

Authority or Registrar or the Tribunal or the High Court under the Act or the rules made there under.<sup>88</sup>

8. **Farmers are entitled for their share in the Gene Fund for conservation of plant resources:** The Gene Fund shall, in the prescribed manner, be applied for meeting any amount to be paid by way of benefit sharing under sub-section (5) of section 6.<sup>89</sup> Authority has to establish contents of certificate and invite claims of benefit sharing from the public. Claims can be made by person, firm, government or NGO. Enquiry and hearing from both sides will be done. Order explicitly indicating amount of benefit sharing based upon the extent of contribution made by such claimant will be made by the Authority. Deposit should be made in the National Gene Fund by the concerned for the purpose of distribution of the benefits among the beneficiaries. Beneficiaries are obviously farmers and because they are incapable of applying for benefit sharing on their own due to their weak position and lack of knowledge, others such as NGOs are given power to apply on their behalf. This is a very progressive step taken under this law in favour of the farmers.
9. **Consent of the farmer is necessary in the case of EDV from his Farmer's Variety:** Notwithstanding anything contained in sub-section (6) of section 23 and section 28, where an essentially derived variety is derived from a farmers' variety, the authorization under sub-section (2) of section 28 shall not be given by the breeder of such farmers' variety except with the consent of the farmers or group of farmers or community of farmers who have made contribution in the preservation or development of such variety.<sup>90</sup>
10. **Farmers are entitled for community rights:** Any person or group of persons (whether actively engaged in farming or not) or any governmental or nongovernmental organization may, on behalf of any village or local community in India, file, any claim attributable to the contribution of the people of that village or local community in the evolution of any variety for the purpose of staking a claim on behalf of such village or local community. Compensation will be awarded to the community concerned after due hearing.<sup>91</sup> People of villages or local communities who contribute for the evolution of plant varieties are invariably farmers.

## CONCLUSION

The foregoing analysis of the legal protection of plant varieties and legal rights of farmers indicates that the west is in favour of patent and other forms of protection to plant varieties as they are biotechnologically strong. The south is more in favour of protecting the rights of the farmers as they are rich in biodiversity. Aftermath of TRIPS agreement has witnessed unprecedented patenting of genetic material raising ethical issues. Much of the plant genetic material has come under the monopoly of MNCs. This is a dangerous development as it may rob the people of their resources and drive them to starvation. Movements are on the rise in favour of farmers' rights in the wake of threat to their rights by MNCs. International agreements are also on the anvil to provide rights to the farmers.

<sup>88</sup> Section 44 of the Protection of Plant Varieties and Farmers' Rights Act, 2001

<sup>89</sup> Section 45 (2) (a) of the Protection of Plant Varieties and Farmers' Rights Act, 2001

<sup>90</sup> Section 43 of the Protection of Plant Varieties and Farmers' Rights Act, 2001

<sup>91</sup> Section 43 of the Protection of Plant Varieties and Farmers' Rights Act, 2001

India being a developing country blessed with rich bio resources has acted in a cautious way by not providing patent protection to plant varieties and opting for a *sui generis* model. At the same time it has included a number of farmers' rights in that model. The rights provided to the breeders under the Protection of Plant Varieties and Farmers Rights Act, 2001 are not unlimited. Even farmers are also entitled to register not only their varieties but also new varieties. But this provision is seldom used by the farmers due to the technicalities involved in the registration process.<sup>92</sup> The rights provided to the farmers are also limited. Although the Act imposes limitations on breeders, the rights provided to them are significant and advantageous. Although farmers are provided certain rights, they are not as significant as the rights of the breeders. In other words, it can be stated that the law is tilted in favour of breeders. There is a need to strengthen the rights of the farmers in terms of vigorous agricultural policy in view of mounting international pressure for a stronger IPR regime for plant varieties. Care should be taken to maintain the balance between these two competing rights to usher in economic stability without costing the lives of the farmers as it is happening in the recent past.

There are some areas that still need a careful attention and revision in this legislation, in spite of the efforts of the lawmakers to keep it a balanced document to protect the interests of the breeders as well as the farmers and the collective interests of the community. Farmers are to be armed with better rights and facilities keeping in view their weak position in terms of education, economics and social status. The areas that need attention are as follows:

1. Benefit sharing determination is cumbersome. It should be simplified.
2. Farmers deserve better and more rights than what are presently provided. Farmers should be provided right to land, right to conserve, reproduce, and modify seed and plant material, right to feed and save the country, right to just agricultural prices and public support for sustainable agriculture, right to information, right to participatory research, right to natural resources and right to safety and health.
3. Farmers may not be able to register because of tough requirements. The requirements are to be liberal in the case of farmers.
4. Laboratories should be established to facilitate farmers to test their varieties and prepare documents required for registration.
5. Official facilitators should be appointed to help farmers in realising their rights.
6. Farmers should be properly educated regarding the advantages of getting their varieties of plants registered. This can be entrusted to Krishi Vijnana Kendras (KRVKs); government departments of agriculture and NGOs.
7. Part of revenue goes to maintenance of ex-situ collections: full benefit should go to farmers.
8. Recovery of determined amount as land revenue by District Magistrate of jurisdiction cannot be applied to a company like Monsanto.
9. Compensation clause for supply of bad quality seeds requires strengthening.
10. Separate track for essentially derived varieties (EDV) under s.23 has to be removed.
11. Authority is too beaucroatic. Farmers' representatives should find place as members of the Authority.
12. Comprehensive IPR policy for farmers should be formulated on top priority.

<sup>92</sup> Applications received by the PVP Authority for registration of Plant Varieties are by big seed companies like Maharashtra Hybrid Company (AHICO) and applications are hardly filed by farmers. See PVP Journal Vols 1-9



'true liberty' on which Communism is based and which requires an ideal or perfect society. Moreover, Indian Public Opinion believes that God alone is perfect and it is not ready to accept any theory of a foreigner of an ideal society or an ideal man.

Hence even by reference to Social Justice, we cannot but say that Fundamental Rights should prevail over Directive Principles.

And lastly, if Minority opinion is accepted it would lead to absurd results. The Minority opinion admits that Directive Principles also impose obligations on the State like Fundamental rights. If this is true, then the combination of the obligations under both, Fundamental Rights and Directive Principles will make the obligation double. But the Minority opinion holds that the combination of the second obligation with the first will exempt the State from its first obligation and result in giving fresh powers to it. The truth however is that

power and obligation are jural contradictions. Therefore obligation can never give rise to power just as fire can never give rise to snow.

This interpretation will give rise to one more absurdity. If it is accepted, it can also be used to defeat other provisions of the Constitution e. g. Separation of Powers. It may be contended that if there is a conflict between the obligation of the executive to act only in accordance with law and an executive action taken to implement a Directive Principle, the executive action should prevail. This would clearly convert our Democracy into Dictatorship. This interpretation must be therefore rejected.

Hence in case of a conflict between a Fundamental Right and a Directive Principle it is Fundamental Right which will prevail. And Directive Principles can be treated only as Chart of Duties of Government and never as source of its powers.

### "THE CONCEPT OF JUDICIAL PROCESS — A CONSPECTUS"

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#### WHAT IS JUDICIAL PROCESS?

In the domain of modern jurisprudential thought "Judicial Process" as a concept is relatively of recent origin and its study and research occupy a place of considerable importance. The need to analyse, discuss and evaluate the concept of judicial process was first felt in United States of America, which largely followed the Anglo-Saxon judicial system. As early as 1919, the American Courts attempted to give a definition of 'judicial process'.

"The judicial process comprehends all the acts of the Court from the beginning to its end, and in a narrower sense is the means of compelling a defendant to appear in Court after suing out the original writ in civil cases and after the indictment in criminal cases and in every sense as an act of a Court and includes any means of acquiring jurisdiction and includes attachment, garnishment or execution and also the writ."<sup>(1)</sup>

According to this definition, judicial process covers the entire methodology involved in adjudication of disputes right from the institution of a suit till the execution of a decree. In later years the great American Jurist

Roscoe Pound expanding the concept further observed:

"In an analysis of judicial process we may set off, first, with ascertainment of facts upon which the determination must proceed, next the facts having been found, the judicial decision according to law, involves: (i) finding legal precept; (ii) interpreting the legal precept; (iii) applying the precept to the cause."<sup>(2)</sup>

In an attempt to examine judicial process, we are primarily concerned with the phenomenon a judge employs in ascertaining the facts, in exacting the law and the methodology he follows in applying the legal principles to the established facts before him for the purpose of administering justice according to law. We are equally concerned with the personality of the judge, his legal education, environment and psychology, his thoughts and traditions and the impact of precedents on him and above all the influence exercised on his mind by the current political, sociological and economic factors operating in the society.

1. Blair v. Mox Base Security Bank, (1919) 176 N. W. 98.

2. The Theory of Judicial Decision. Roscoe Pound. (1923) 36 Harvard Law Review, pp. 945, 952.

In other words a study of judicial process has to invariably take into account the main legal values operating in a given society. According to Roscoe Pound, in a civilised society men must be able to assume that others will commit no external aggression upon them; they may control for beneficial purposes what they have discovered and appropriated for their use what is created by their own labour and acquired under the existing social and economic order.

It must also be assumed that those with whom they deal in the general intercourse of society will act in good faith and will make good reasonable expectations created by their promises or conduct, will carry out their promises according to the expectations of the community and will restore specifically or by equivalent what they obtain to which they are not entitled as a matter of right or otherwise.<sup>(3)</sup>

### NUANCES OF THE CONCEPT

It is imperative for every civilised society to strengthen its judicial system by periodically checking and remedying its deficiencies while evaluating to what extent the system is able to uphold the legal values to which the society is dedicated. Justice Cardozo through his empirical studies on the conceptual analysis of judicial process arrived at some basic postulates which are of great value:

"Logic and history, and customs, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of law. Which of these forces shall dominate in any case must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired. One of the most fundamental social interests is that law should be uniform and impartial. There must be nothing in its action that savours of prejudice or even arbitrary whim or fitfulness. Therefore in a way there shall be adherence to precedent..... Uniformity ceases to be good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare. These may enjoin upon the judge the duty of drawing the line at another angle, or stocking the path along new courses, of marking a new point of departure from which others who

come after him will set out upon their journey."<sup>(4)</sup>

This leads to the question as to the nature of ingredients of the concept of judicial process which are required to be examined, analysed and evaluated. They are litigation-institutional procedures and practices, judicial administration, review, behaviour and values, social psychology of litigants, role of bar in interpretation of law and administration of justice in adjudication of disputes inter alia.

### AREAS OF CONCERN

It may be appropriate here to identify and discuss briefly the above described areas of concern of judicial process so as to improve upon the existing patterns of composition and working. The first and foremost is the judicial system. Right from the times immemorial the role played by the judicial system, as a balancing mechanism of the conflicting pulls and pressures operating in a society, is considered sacrosanct. When we speak about judicial system, it includes judicial organisation and administration. It concerns with the organisation and operation of the hierarchy of Courts at the Central, State and District levels. It also concerns with the schematic patterns of jurisdiction and executive machinery discharging the functions of appointment, promotion, and termination of judges and associated administrative personnel, terms and conditions, duties and powers; and demarcated jurisdictional areas of operation.

Areas of organisation relating to original and appellate Courts and also adjectival laws concerning principles, procedures and practices followed by Courts, also form part of judicial system.

The next important area of study and research in the judicial process is the institution of judges.

Blackstone commenting on the role of judges in a politically organised society observed as follows:

"... They are the depositories of the law; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to law of the land. Their knowledge of that law is derived from experience and study ... and from being long personally accustomed to the judicial decisions of their predecessors."<sup>(5)</sup>

3. Roscoe Pound, Introduction to American Law, 1919, pp. 36-44 (1919).

4. Cardozo — The Nature of Judicial Process.—p. 112 (1921).

5. Commentary on the Law of England—S. Williams Blackstone — American Edition, Chicago, 1871. Vol. II pp. 69-70.

Judges function institutionally in the judicial system even though they may discharge their duties individually. Members of judiciary, irrespective of the place they occupy in the hierarchy, play a phenomenal role not only in shaping the tenor, growth and direction of relations of people inter se but as well in moulding the future of the society in which they function.

Discussing the tasks of a judge, which are by no means small and easy, Justice Cardozo observed :

"If questions for a decision presented themselves as abstractions or like mathematical problems to which a specified formula or theorem could be applied, the art of judging would be easy. But law suits, dispassionate as they may appear in printed records are very personal things. In them as they unfold in open Court are tragedy, comedy, sordidness, aspirations, human hopes, human misery and degradations. The judge has before them human beings not at peace but at war with themselves, with their fellowmen and at times with God..... In them we see human beings in conflict, so the process of judging involves many imponderables." (6)

The third area of study is the doctrine of *Stare Decisis* and its impact on the functions of a judge. Under any judicial system, judges are ordained to administer justice according to law. Such Law includes both the substantial and adjectival law as passed by legislature and the judge-made law that holds the field. There have been two schools of thought on this subject. One is that a judge must decide a case according to established tenets of judicial decisions to ensure preservation of ~~certainty~~ certainty and uniformity and not according to his notions of justice however well-thought-out they may be.

To quote Justice Frankfurter :

"The judicial judgment . . . . . must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment." (7)

The doctrine of *Stare Decisis*, which means to stand by things decided, is an outstanding principle of law, and is innovated to steady the law so that it may not fluctuate from judge to judge and case to case.

Prof. Von Mehren, commenting on the orthodox aspects of the theory observed :

6. Cardozo — The Nature of Judicial Process — 1921 (p. 112).

7. *Malinski v. New York*, (1944) 324, U. S. 401, 417.

"A society professing a theory of judicial decision by which the true nature of judicial process is observed, encourages a mechanical execution of the judicial function. When the legal profession, including the judges, is trained to think in mechanical and doctrinal, rather than functional and substantive terms, mental habits are developed that stand in the way of perception requisite to a truly functional approach." (8)

The second theory is that judging is a creative art and not a mechanical process. According to this theory considerable leeway and scope is given to a judge for judicial reasoning and innovation of new principles of law or new interpretations of the existing law attuning himself to the socio-economic circumstances and demands in the community in which and for the benefit of which he functions as a judge.

In support of this theory Donald Karoll observed :

"The function of a judge is primarily adjudication. This is not a mechanical craft, but exercise of a creative art, whether we call it legislative or not which requires great ability and objectivity." (9)

Supporters of this theory argue that by fettering a judge with precedents and not allowing him any judicial discretion would not only stunt the growth of law but as well may result sometimes in perpetuating the errors of predecessors.

Jurists like Synder suggest a *via-media* approach by correlating the two theories which though aimed at the same object i.e. ensuring dispensation of justice in the society, but opposed to each other in approach.

"In deciding between the alternatives open to them within the contours of pre-existing laws, the judges try to make the just or the juster choice. Though it is more important that a rule of law should be settled than it should be theoretically correct, a trial is however a mere exercise in logical perfection and it should be unnecessary to remind ourselves that constitution and laws are designed to establish justice. If there were no rules, we would be governed by men and not law. Order is not only Heaven's first law, order is the essence of jurisprudence. But rules are not the ultimate and, the main thing; that main thing is justice itself, the very right of the matter. The rules are only in aid of that

8. Arthur Von Mehren, *The Civil Law System*, 1957, page 825.

9. Donald Karoll, *Hand Book for Judges*, p. 39.

main thing — the working tools whereby it is attained.”(10)

The pivot around which the entire judicial system rotates and depends for its balance and operation is the institution of judges and any attempt by any one to corrode the faith of the community in the judicial system is bound to have long-range deleterious effect on the progress and prosperity of the community. When a judge, within the scope of his judicial discretion innovates new principles of law or articulates new interpretations of existing law, then law, instead of being stagnant and static, transforms itself into a living and ever-dynamic phenomenon adjusting itself to satisfy the changing needs of the society.

The fourth area of importance in the judicial process is judicial psychology and behaviour. The field of study deals with the investigation of judges as discrete individuals, as members of social groups and as actors in social systems. It is said that a people get the government it deserves, so also it can be said a society gets the judges it deserves. Judges are also products of the society, and however much they may endeavour they hardly can escape from being influenced consciously or unconsciously by environmental, economic and social pressures and pulls operating in the system. Why are some judges pro-labour and some are anti-labour? Why are some convicting judges and some are acquitting judges? Why some are always pro-State authority and some are anti-State authority? Has their economic, family and educational background and upbringing got anything to do with their mental patterns of approach? In the West jurists like Llewellyn, Hobel, Cohen undertook extensive studies and research to arrive at some basic empirical conclusions. Further psychometric research on judicial ideologies that emerged from time to time in U. S. Supreme Court, was undertaken by Jurists like Thurstone and Degan.

Studying U. S. Supreme Court judgments over a span of a decade, Schubert (1965) utilised “factor analysis of correlation matrices based upon dyadic agreement and disagreement in voting with the decisional majority and in dissent, in order to position the ideal points representing the justices in three dimensional psychological space.”

The dominant ideologies that have determined the attitudes of Supreme Court Judges in United States were identified to be (a) the social ideology of equalitarianism, (b) the

political ideology of libertarianism and (c) the economic ideology of individualism.

Judicial ideologies and legal-value-systems always emerge through the thoughts and actions of jurists, judges and lawyers and invariably they have the imprint of their individual or group psychologies. Judicial process necessarily contemplates analysis and research of judicial psychologies and behaviourism.

There are a few other areas of importance in the domain of judicial process which require study and research. To state briefly they are (a) judicial values (b) judicial review (c) psychology of litigants (d) Role of members of bar in the justice dispensation system.

#### METHODS OF STUDY OF JUDICIAL PROCESS

Having identified and outlined the areas that comprise judicial process the last question would be as to the methods of its study.

Cardozo in his classic article “The Nature of the Judicial Process” outlined four methods of study and analysis of judicial process. They are: (a) the method of philosophy, which emphasises the element of logic; (b) the method of history, which seeks developmental explanations; (c) the method of custom, which accepts guidance from past or present practices of the community; (d) the method of sociology, in which the ideals of “social welfare” and “social justice” would be paramount. Among all these methods, Justice Cardozo considered the last method to constitute the greatest force of our day and generation.”

In evolution of these methods the role of judges is significant and it always involves discovery, deduction and declaration — one to meet the ends of justice. Law and the judicial process are so inter-twined that one cannot exist without the other and each can improve its utility and performance by experience.

The observations of the renowned Oliver Wendell Holmes in his treatise “Common Law” are worth quoting in this context.

“The life of law has not been logic; it has been experience. The felt necessities of time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices of judges share with fellow men, have had a good deal more to do than the syllogism

10. Synder, Preface to Jurisprudence (1954), p. 601.

determining the rules by which men should be governed."(11)

If necessity is the mother of invention, dissatisfaction is the father of progress. Civilisation is a continuous struggle of people from a disorganised homogeneity to organised heterogeneity with unceasing desire to innovate and invent new systems for the benefit and prosperity of mankind.

The attempt made here to identify and highlight the areas in judicial process in respect of which study and research is required to be undertaken (in the light of contemporary experience of the West) is to stimulate further thought on this fascinating field of study in the realm of jurisprudence.

11. Cited in Courts, Judges, and Politics. 2nd Ed. Walter Murphy and Herman Prichett, 1974, at p. 8.

### "SUPREME COURT'S DECISION: RELIEF WHEN AWARD IS MADE BUT NOT FILED."

By:— Dilip Suraana Advocate, Calcutta.

The decision of the Supreme Court in Satish Kumar v. Surinder Kumar reported in AIR 1970 SC 833 has been followed in so many cases but it is difficult to locate one that has actually analysed the implications of the said decision. The particular portion of the judgment that is relied upon and followed is from the judgment of Hegde J. and can be quoted as below:—

"Arbitration proceedings, broadly speaking may be divided into two stages. The first stage commences with arbitration agreement and ends with the making of the award. And the second stage relates to the enforcement of the award."

Since arbitration proceeding has been divided into such two stages an aggrieved party can get relief under Section 41 (b) of the Arbitration Act even after the award has been made (but not filed) on the basis that "arbitration proceeding" as such exists. In fact, in many cases relief has been granted under that section relying upon this decision of the Supreme Court. It would not be out of context to refer to Section 41 (b) which is as follows:—

"S. 41. Subject to the provisions of this Act and of rules made thereunder—

(a) ... ..

(b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matter set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court;

Provided that nothing in Clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters."

There would not have been any difficulty were the "arbitration" and the "arbitration proceeding" the same thing. With greatest

respect to the Hon'ble Supreme Court, I beg to submit that the fine distinction between an arbitration and an arbitration proceeding has been completely overlooked while the arbitration proceeding was being divided into two stages.

An arbitration is conceived when an intention is so expressed and continues right up to the moment the dispute finally comes to an end. It is the arbitration that consists of two stages, the first being the arbitration proceeding commencing from the moment the arbitrator receives the reference and which comes to an end with the making of an award; the second stage — the award proceeding comes into existence the moment an award is made and its culmination always coincides with the enforcement or the setting aside of the award that is when the dispute finally comes to an end.

The arbitration commences when the parties decide upon it. Only after its commencement an arbitration can be proceeded with. Proceeding simply means a procedure which culminates in certain result. Herein lies the vital difference between commencement of an arbitration and commencement of an arbitration proceeding. Conclusion of an arbitration agreement does not of itself signify that the arbitration proceeding has commenced. It may so happen that dispute is settled even before the arbitration enters into its first stage i.e. when the arbitrator receives the reference, or take another instance when an agreement has been reached upon but no arbitrator is appointed. Can we, in such a case, say that the arbitration proceeding has commenced? It is true that the arbitration did come into existence but certainly there was no proceeding in the arbitration. This is because arbitration proceeding can commence only before some particular person. For the commencement of an arbitration, no such particular person is



Communism is the dissolution of the conflict between existence and essence, between necessity and freedom.

Freedom, which is the essence of internal substratum of society, hidden by the existing reality of capitalist society, will again also become the external reality. That is the State, which existed prior to the coming of political State. a State with freedom and justice where no private but only collective property existed will be reestablished. That is with the passing of ownership of means of production into the hands of a Community the individual will have true freedom.

Marxism sees a person's essence as the potential to use one's abilities to the fullest and to satisfy one's needs.<sup>13</sup> Since in capitalist society production is controlled by few, such society cannot satisfy those individual needs. Only through communism, these needs can be met.

IV. MODERN THEORIES

A. THEORIES BASED ON THE VALUE OF UTILITY:

The utilitarian theory played a prominent role in the nineteenth and twentieth century philosophy and political theory. The utilitarian's approach to the problem of rights is through values such as equality, happiness, liberty, dignity, respect which concern man's behavior, are studied not at metaphysical concept but are accepted and acted upon. The utilitarian theories seek to define notion of rights in terms of tendencies to promote certain end, e.g. common good.

Jeremy Bentham, the exponent of the classical utilitarian adopted the maxim "The greatest happiness of the greatest number" to popularize his philosophy.

By the principle of utility he meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question; or, what is the same thing in other words, to promote or oppose that happiness.

The happiness of an individual is increased if there is an addition to the sum total of his pleasures greater than any addition to the sum total of his pains. The interest of the community comprises of all interest of the individuals. Therefore the happiness of the community will be increased if the total of all the pleasures of all its members is increased to a greater extent than their pains. Bentham lists fourteen pleasures and twelve pains as a comprehensive account of happiness-relevant consequences. In assessing the rightness of an action, value of each particular lot of pleasure or pain is measured by referring

<sup>13</sup> *Marx, The Economic and Philosophic Manuscripts of 1844*, at 135. D. Smith, E.J., 1964.

to seven criteria; intensity, duration, certainty, propensity, fecundity, purity and extent.

According to Bentham, the principle of utility should be the sole proper basis for morality and legislation. Both the rightness of every act we do in private life and the rightness of public measures of all kinds should be tested by his 'felicific calculus'. To him, the majority opinion of the community regarding what is right or wrong is not a criterion to approve or condemn, only the test of utility can decide.

Bentham's principle of utility has some psychological assumptions. He believes that all that men desire are pleasures and the avoidance of pains, and that men are motivated to do whatever they do by their desires.

Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think; every effort we can make to throw off our subjection, will serve to demonstrate and confirm it. In words a man may pretend to abjure their empire; but in reality he will remain subject to it. The principle of utility recognizes this subjection and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and law, systems which attempt to question it deal in sounds instead of sense, in caprice instead of reason, in darkness instead of light.

Thus Bentham believed that every human decision was motivated by some calculation of a pleasure and pain. Hence both Governments and the limits of Governments were to be judged not by references to individual rights but in terms of their tendency to promote the greater happiness of greatest number.

Bentham's happiness principle enjoyed enormous popularity during the 19<sup>th</sup> Century, and most reformers spoke in terms of utilitarianism. Yet his theory met lots of criticisms. Some of the objections raised against utilitarianism are:

1. That the calculus provided is impracticable. Because, no person can know all the consequences of his acts and it would be foolish to try to assess them.
2. The pleasure and pains of different people are not intrinsically commensurable. How to weigh the enjoyment of one who likes late night parties as against that of his neighbours, that is how to balance the satisfaction of majority against the distress caused to minority.
3. Principle of utility is unworthy. Satisfaction of all human desires cannot be the only test of what is right and wrong. There are higher values like worth of individual and human dignity.

4. Human desires and satisfaction are capable of manipulation. They can be manipulated by measures such as education, indoctrination, advertisement etc. By Advertisement a man can be brought to desire things which he would not have desired otherwise.
5. Utilitarians are not clear on whose interests are in questions. Interest of a national community? Mankind? Present or future generations? On all creatures? Whether interests of unborn are included?

Some of the criticisms levelled against Bentham's theory were refined by the Economic analysts.

The Economic analysis of law is an attempt to offer a sophisticated scientific alternative to utilitarianism. One of the main problems with utilitarianism is lack of a method for calculating the effect of decision or policy on the total happiness of the relevant populations: it offers no reliable technique for measuring change in the level of satisfaction of one individual relative to a change in the level of satisfaction of other. How do you compare one person's happiness with another's? Problems like this led the Economists to make utility arguments more rigorous.<sup>94</sup>

The utility calculus is objected because it does not provide an answer to how advantages to some can be measured against the disadvantages to others. But this is not so according to economic analysis; for all that happens to us can be reduced to things we will pay to have or pay to be without, the solvent of a hypothetical market. Should my neighbor be prevented from having noisy parties, which disturb me? He pays 'X' pounds for the privilege, if there was a market in noisy parties: I would pay 'Y' pounds to be left in peace. If X is greater than Y, satisfactions are maximized by allowing him to go ahead. That is the 'efficient' solution. Where Bentham spoke of the greatest happiness of the greatest number the economic analyst speaks of overall efficiency.<sup>95</sup>

The economic analysis of law was first applied to specific areas of law such as anti trust legislation and the law of nuisance. Later it has been directed towards the legal system as a whole. Richard Posner in his Economic Analysis of Law makes one of the most systematic applications of this approach. His theory is concerned with efficiency, meaning the maximizing of satisfactions as defined by the economic criteria.

According to Posner, common law can be explained in terms, and argued that common law rules were the result of arguments, which are in reality economic in nature. He says 'The common law method is to allocate responsibilities between people engaged in interacting activities in such a way as to maximize the joint value or, what amounts to the same thing minimise the joint costs of activities. It may do this by redefining a property right, by

devising a new rule of liability or by recognising a contract right'.<sup>96</sup> His argument was the common law judges have decided the cases to maximize social wealth. Economic analysis holds, that social wealth maximization is a worthy goal so that judicial decision should try to maximize wealth, by assigning rights to those who would purchase. It argues that laws should be decided to increase social wealth.

For Posner wealth maximization is a value in itself '....The economist when speaking normatively tends to define the good, the right, or the just as the maximization of welfare in a sense indistinguishable from the utilitarian concept of utility or happiness'. For Posner, 'wealth maximization is value because society that takes wealth maximization to be its central standard for political decision will develop other attractive features. In particular it will honor individual rights, encourage and reward a variety of virtues, and give point and effect to the impulses of people to create benefits to each other'.<sup>97</sup> Posner claims that wealth maximization will respect individual rights. A society that sets out to maximum social wealth will require assignment of rights to property, labour and so forth.

He argues that wealth maximization is of instrumental value, because a society that maximizes wealth will recognize rights, such as right to their own bodies, right to direct their own labour as they wish etc.

However, it is criticized, that a society is not a better society just because it specifies that certain people are entitled to certain things. Witness South Africa. Everything depends on which rights the society recognizes.<sup>98</sup> It does not provide that wealth maximization leads to recognition of certain individual rights. What can be said is that these are the rights that a system of wealth maximization would recognise.

#### B. Theories based on Justice:

Men have talked about justice for as long as they have talked about law. The scope of justice is, however, wider. Three sorts should be distinguished. Justice may be:

1. Claimed to something inherent in law; or
2. Law may be contrasted with justice; or
3. Justice may be a measure for testing law.

If law is a system of rules, then some aspects of 'procedures' and of 'formal' justice may be inherent in it. If a rule stipulates that all motorists exceeding a speed limit shall be fined but those exacting fines (is

Administrative authorities or police) take no steps to find out whether people have fulfilled the condition of rule then both procedural justice is violated and the rule becomes empty formula, which does not deserve the designation "legal". If during a period of political turbulence a revolutionary Court selects victims for execution on an *ad hoc* basis, without announcing any universalisable criteria, it violates formal justice, and may be said that it is not operating under any system of law.

If the revolutionary Court announces that all who voted for an ousted regime to be shot and takes all steps in each case to find out whether or not a person had so voted, it meets the requirements of both procedural and formal justice. It may be 'law' for all purposes yet it may not appeal to one's sense of justice. Here 'law' is distinguished from 'justice' in the second of the three distinctions referred to. It is the case that legal rules however good in themselves may nonetheless lead to injustice. It is because the features of some of the situations in which individuals confront the law are so unique that they cannot be captured by any rule but can be captured by the 'sense of justice'. If we can frame such a rule but existing legal rules do not include it, then we are making a point falling under the distinctions: we are saying that existing rules are unjust and should be replaced by new rules. We are then using justice as measure for law.

When a Court applies rules according to its terms; justifies its decision by reference to accepted standards of legal reasoning, it may do justice according to law. But still the outcome may be unjust because rules and other standards are themselves unjust. When justice is used as the measure of the law, the assumption is that law could be made to conform to justice; 'justice' in this context stands for a substantive moral criterion sometimes called 'distributive justice' or more recently 'social justice'. The law ought to distribute rights and duties in a certain way, and if it does not it is unjust. Thus the object of justice is proper distribution of social goods.

In this sense, the most celebrated of the recent theories is that advanced by Professor John Rawls (b.1921) of Harvard University.

For Rawls, the principles of justice provide a way of assigning right and duties in the basic institutions of Society. Those principles define the appropriate distribution of the benefits and burden of social co-operation.

What are the rights of justice? To define them, Rawls imagines a group of men and women who come together to form a social contract. He calls this situation the Original Position. It consists of people, each representing a social class. They are placed behind a 'veil of ignorance'. They have only general information of human psychology and the laws of science. They do not know to which social class they are going to belong or even at what stage of development their society stands. In this situation by unanimous agreement

they choose the principles, they are guided only by rational self-interest. Each knows making their choice, they are guided only by rational self-interest. Each knows that he has a plan of life (his own conceptions of good), therefore they agree to social principles, which will give them best chance of achieving each of his life plan. While choosing these principles there are no special interests taken into account, they are objectively just.

The principles, which the people in this Original Position choose are:

#### First Principle:

"Each person is to have an equal right to the most extensive system of equal basic liberties compatible with a similar system of liberty for all."

#### Second Principle:

Social and Economic inequalities are to be arranged so that they are both:

- (a) to the greatest benefit of the least advantaged, and
- (b) attached to offices and positions open to all under conditions of fair equality of opportunity."

Rawls does not specify the 'system of equal basic liberties'. He indicates that it includes political liberties (right to vote, to be eligible for public office, freedom of speech and assembly, liberty of conscience and freedom of thought freedom of the person); the right to hold personal property, and freedom from arbitrary arrest and seizure. By their first principle people would choose equality in things, and they give 'lexical priority' over the second principle; that is, they agree that the equal liberties are not sacrificed for gain in respect of income, wealth or power (the matters dealt with in the second principle). This they do so because men are rational, they know by doing so they have the best chance of obtaining for themselves the primary social goods and pursue their ends. Primary social goods being liberties, opportunity, power and self respect.

The first clause of second principle allows for social and economic inequalities, only if they are for the benefit of the least advantaged. This is his famous 'difference principle' the principle in the original position would choose this because they do not know whether they would be favoured or disfavoured by any inequality, in the worse case, they could be, 'least advantaged'.

The rest of second principle make reference to two things which qualify the call for arrangements to be so ordered as to confer maximum benefit on

warns against either standing still or leaping forward, it calls for movement in an intelligible design". If one goes through the annual reports of any human rights non-Government organization such as Amnesty International or International League of Human Rights, we find that the approach is from 'sense of injustice' be it disappeared in Argentina, repression of religion in Soviet Union or current human rights abuse, have found positive response from the public. Therefore, Cahn's theory of "sense of injustice" is useful insight for the students of Human Rights law.

### C. Theories Based on Human Dignity:

The 'dignity of the human person' and 'human dignity' are phrases that have come to be used as an expression of a basic value accepted in a broad sense by all peoples. 'Human Dignity' appears in the Preamble of the Charter of UN. The term dignity is also included in the Article 1 of UN Declaration of Human Rights. The Helsinki Accords in Principles VII affirm that the participating States will promote the effective exercise of human rights and freedoms "all of which derive from the inherent dignity of the human person. Reference to 'human dignity' are also found in various Resolutions and Declarations of international bodies.

Though there is no explicit definition of dignity, one lexical meaning of 'dignity' is intrinsic worth of human person. Scholars suggest that worth of every person should mean that individuals are not to be perceived or treated merely as objects of the will of others.<sup>102</sup> The idea that human rights are derived from the dignity of the person is neither truistic nor natural. It has two corollaries. The first corollary is the idea that basic rights are not given by authority and therefore may not be taken away; the second is that they are rights of person; every person. That is Human dignity is private, individual and autonomous.

But there are others who hold that 'dignity' is a collective one. It is public, collective and prescribed by social norms.<sup>104</sup> Dignity is thus defined as the 'particular cultural understanding of the inner moral worth of the human person and his or her proper political relation with society'. Dignity is something that is granted at birth or an incorporation into the community as a concomitant of one's particular ascribed status, or that accumulates and is earned during the life of an adult who adheres to his or her society's values, customs and norms: the adult that is, who accepts normative cultural constraint on his or her particular behavior...<sup>105</sup>

102. Oscar Schachter, "Human Dignity as a Normative Concept", 77 Am. J. International Law 848, (1983).

103. *Ibid.*

104. Rhoda Howard, "Dignity, Community and Human Rights" in Naim. (Ed.) Human Rights in Cultural Perspectives, 1992, p. 11.

105. *Ibid.*

the least advantaged. First, he refers to 'just savings principle' the people in the original position would know (knowing human psychology) that they have some concern for at least next generation, so they will agree that all social assets should not be squandered. Second, they will not debar any office, and equality of opportunity would be fair.

Rawl's theory envisages a four stage unfolding of just institutions.

The first stage is the original position, in which two lexically ordered principles of justice are chosen. The second stage is a constitutional Convention, where they choose a Constitution, where the two principles are embodied. The third stage is that of legislation, where laws must comply with two principles of justice and the Constitution. The fourth stage relates to application of laws by judges and other officials.

### Edmund Cahn's theory of justice:

Edmund Cahn's theory of justice no longer enjoys the influence it once had. But it has a particular appeal to students of human rights.

His theory is that the problem of justice should be approached from its negative rather than its positive side. He prefers to place the emphasis on the sense of injustice because it forms a part of human biological endowment, where injustices are easily identifiable from justice. Injustice is alive with movement and warmth producing outrage and anger. Therefore, justice is essentially a process of remedying or preventing whatever would arouse the sense of injustice.

How does the sense of injustice manifest itself? First and perhaps most important of all feelings of injustice are precipitated in a group of human beings by the creation of inequalities which the members of the group regard as arbitrary and devoid of justification. The sense of justice revolts against whatever is unequal by caprice. The inequalities resulting from the law must make sense; the law becomes unjust when it discriminates between indistinguishables.

The sense of injustice also makes certain other demands, such as demand for recognition of merit and human dignity, for impartial and conscientious adjudication, for maintenance of a proper balance between freedom and order, and for fulfillment of common expectations.<sup>100</sup>

Common expectations, according to Cahn, assert consistently and continuity of legal operation by law makers and Judges. It also asserts to the law to respond to new social needs. Therefore, he says "The sense of justice

100. Edmund Cahn, "The Sense of Injustice" (New York, 1949), p. 13.

101. *Ibid.* pp. 20-22.

Their approach to the law represents a theory of values rather than a mere description of social facts. Their value system proceeds from the assumption that a value is a 'desired event'.<sup>106</sup> Men want power (defined as participation in making of important decisions), power is "unmistakably a value in the sense that it is desired or likely to be desired". The other value categories or 'preferred events' gratifying the desires of men are wealth, that is control over goods and services, well being or bodily and psychic integrity, enlightenment, or the finding and dissemination of knowledge, skill or the acquiring of dexterities and development of talents, affection, or the cultivation of friendship and intimate relations; rectitude or moral responsibility and integrity; and respect or recognition of merit without discrimination on grounds irrelevant to capacity. This list for the authors is representative and not exhaustive.<sup>107</sup>

For Lasswell and Mc Dougall, Law is a form of power value and described as "the sum of the power decisions in a community". It is essential to the legal process that a formally sanctioned authority to make decisions with an effective control ensuring the execution of these decisions.<sup>108</sup> This combination of formal authority and effective control produces a flow of decisions whose purpose is to promote community values in conformity with the expectation of the community, that is law is viewed as process of decision making in a community as a whole and not as mere body or rules.<sup>109</sup>

The authors postulate that the members of the community should participate in the distribution and enjoyment of values, or differently expressed, that it must be the aim of legal legislation and adjudication to foster the widest postulates sharing of values among men. The ultimate goal of legal control the authors envisage is a world community in which democratic distribution of values is encouraged, all available resources are utilized to the maximum degree and the protection of human dignity is regarded as paramount object of social policy.

The supreme value of democracy is the dignity and worth of the individual; hence a democratic society is a commonwealth where there is full opportunity to mature talent into socially creative skill, free from discrimination on grounds of religion; culture or class.<sup>110</sup>

Why 'human dignity' is considered as paramount objective of social policy or why is it a super value? The authors offer this explanation:

106. Lasswell and Kaplan, "Power and Society" (New Haven, 1950), p. 16.

107. *Ibid.* p. 56.

108. Mc. Dougall, "The Law School of the Future", 56, Yale Law Journal, (1947), 1345, 1348.

109. *Ibid.*

110. Meron Op. cit. at 97.

and to explicate today than ever before. The contemporary image of man as capable of respecting himself and others, and of constructively participating in the shaping and sharing of all human dignity values, is the culmination of many different trends in thought, secular as well as religious with origin extending far back into antiquity and coming down through the centuries with vast cultural and geographic reach. The postulate of human dignity can no longer be regarded eccentric doctrine of lonely philosophers and peculiar sects. This postulate as we have defined it in terms of demands for the greater production and wider sharing of all values and preference for persuasion over coercion, has been incorporated, as our study of constitutive process demonstrates, with many varying degrees of completeness and precision into a great cluster of global prescriptions, both constitutional and customary, and into the constitutional and legislative codes of different national communities."

Thus, as we can notice, they are not clear as to why human dignity is super value. However, the authors show that a value such as 'dignity' — a value that most people agree can be a springboard for structuring a rights system.

#### Gewirth on Human Dignity:

As seen earlier, the dignity of human person and 'human dignity' are phrases that have come to be used as an expression of a basic value accepted in a broad sense by all peoples. Many international Covenants, Declarations, Conventions use the expressions.

According to Gewirth, the sense of dignity, in which humans are said to have equal dignity is not same as we say of a person, that he behaves without dignity or he lacks dignity. The kind of dignity in which all humans are said to be equal is characteristic that belongs permanently and inherently to every human as such.

'A has human rights'. 'A has inherent dignity' are often used on same plateau. A has inherent dignity is often taken to mean that by virtue of natural law, the human person has the right to be respected is the subject of rights, and possess rights. If these are equivalent then the attribution of dignity adds nothing to the attribution of rights. Therefore it is essential to consider whether attribution of inherent dignity can have status independent of and logically prior to the attribution of rights.

Gewirth finds the independent variable. The independent variable of all morality, then is human action. This independent variable cuts across the distinctions between secular and religious moralities, between egalitarian and elitist moralities, between deontological and moralities and so forth. Thus he sees that all moral precepts, are concerned with how persons ought to act

toward one another. Like Kant's, 'act is such a way that the maxim of your action can be universal law'; Bentham's, 'to act so as to maximize utility'; Nietzsche's, 'to act in accord with the ideals of the superman'; Marx's, 'to act in accordance with the interest of the Proletariat', and Kierkegaard's 'to act as God Commands, and so forth'.

All actions then according to Gewirth have two generic features. One is voluntariness or freedom, in that the agent's control or can control their behavior and the other generic feature is purposiveness or intentionality in that the agents aim to attain some end or goal which constitute their reason for acting. This goal may consist in either in action itself or in something to be achieved by action.

After logically arguing as to what it means by saying "I do X for end or purpose E", in various steps, Gewirth concludes that it may be ultimately expressed as a general moral principle.

"Act in accord with the generic rights of your recipients as well as of yourself" which he calls as Principle of Generic Consistency (PGC).

The summary of his arguments are firstly, 'that every agent logically must accept that he has rights to freedom and well being as the necessary conditions of his action, as conditions that he must have, for if he denies that he has these rights, then he must accept that the other persons may remove or interfere with his freedom and well being, so that he may not have them but this would contradict his belief that he must have them. Secondly that the agent must accept all other prospective purposive agents have the same rights to freedom and well being as he claims for himself. Thus since all humans as actual, prospective or potential agents, the rights in questions belong equally to all humans. Thus the argument fulfill the specification for human rights: Subjects and Respondents are all humans equally that the objects of rights are the necessary goods of human actions and justifying basis of rights is a valid moral principle.

As seen, human action had generic features of voluntariness and purposiveness. By virtue of voluntariness of his actions the agent has a kind of autonomy or freedom. And by virtue of his actions purposiveness he regards his goals as good, as worth attaining. This element of worth is involved in every concept and context of human purposive action. Such action is not merely an unordered set of episodes to events. Rather, it is ordered by its orientation to a goal, which gives its value, its point.

The goal or end worth for the agent as something to be reflectively chosen, aimed at, and achieved. The worth he attributes to his ends pertains *a fortiori* to himself. They are his ends, and they are worth attaining because he is worth sustaining and fulfilling, so that he has a justified sense of self-esteem.

of his own worth. He pursues his ends not as an uncontrolled reflex response to stimuli, but because he has chosen them after reflection as alternatives. Every agent is capable of this unlike other natural entities; who are subject to external forces of nature, he can and does make his own decisions on the basis of his own reflective understanding. By virtue of these characteristic of his action, the agent has worth or dignity. The argument mean that every agent has worth or dignity because of his capacity for controlling his behavior and acting for the ends he reflectively chooses.

Thus, dialectically every person should have freedom and well-being (necessary goods) as a person who has dignity or worth. Assertorically that every agent has dignity, his status as agent should be maintained and protected. For dignity is an attribute or characteristic that, of itself deserves respects and makes mandatory the support of the being that has it. This mandatoriness or 'ought' moreover is strict; it is co-relative to an entitlement on the part of the agent who has dignity. In this way dignity entails rights.

#### D. Theories Based on Equality of Respect and Concern:

Dworkin's thesis is similar to the rights in the natural law traditions. He distinguishes, between two kinds of rights. One, 'the background rights' which are rights of abstract kind held against the decisions taken by the society as whole and two, institutional rights held against decisions made by specific institution. Legal rights are institutional rights to decisions in Courts.

Intuitions about justice presuppose a fundamental right namely 'the right to equality', which he calls rights to equal concern and respect.

Dworkin's right to equal concern and respect proceeds from the postulate of political morality. "Government must treat those whom it governs with concern, that is as human beings who are capable of suffering and frustration, and with respect, that is human beings who are capable of forming and acting on intelligent conceptions of law their lives should be lived". Government must not only treat people with concern and respect but with equal concern and respect. It must not distribute goods or opportunities inequally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen's conceptions of the good life of one group is nobler or superior to another."

For the above postulates taken together, Dworkin calls it the liberal conception of equality. It is a conception of equality and not of liberty as a license.

Citizens governed under this conception of equality, each have a 'right to equal concern and respect'. There are two different rights that are comprehended by that abstract right. One -, the right to equal treatment - e.g.

equal treatment in the distribution of voting power—one man must be given one vote, in spite of the fact that different distribution of votes might work for the general benefit. Two, the right to treatment as equal - this is the right to equal concern and respect in the political decisions made as to how the goods and opportunities are distributed.

Suppose the question is raised whether an economic policy that injures long-term bondholders is in the general interest. Those who will be injured have a right that their prospective loss is taken into account in deciding whether the general interest is served by policy. They may not simply be ignored in that calculation. But when their interests is taken into account it may nevertheless be outweighed by the interests of others who will gain from the policy and in that case their right to equal concern and respect, so defined, would provide no objection. In the case of economic policy, therefore, we might wish to say that those who will be injured if inflation is permitted have a right to treatment as equals in the decision whether that policy would serve the general interest, but no right to equal treatment that would outlaw the policy even if it passed that test.

Dworkins proposes the right to treatment as an equal to be taken as fundamental under the liberal conception of equality.

Dworkins believes that right to liberty is too vague. However, he says that certain liberty such as freedom of speech, freedom of worship, rights of association and personal and sexual relations do require special protection against the Government interference.<sup>112</sup> This is not because these preferred liberties have some special or inherent value, but because of procedural hindrances, these rights may face. The hindrance is that if these liberties were left to utilitarian calculation, that is the calculation of general interest, the balance would be tipped in favour of restrictions.

Why is there such an impediment? Dworkin says that if a vote were truly utilitarian then all voters would desire the liberties for themselves and liberties would protect under a utilitarian calculation. But a vote on these liberties would not be truly utilitarian nor would it afford equal concern about and respect for liberties solely by reflecting personal wants or satisfactions of individuals and affording equal concerns to others. This is because external preferences such as prejudice and discrimination against other individuals deriving from the failure to generally treat other persons as equals would enter into the picture. These external preferences would corrupt utilitarianism by causing the individual to vote against assigning liberties to others.<sup>113</sup>

111. Dworkin, *Taking Rights Seriously*, p. 273

112. Meron, *op. cit.* p. 97

113. Meron, *op. cit.* p. 97

Accordingly, the liberties that must be protected against such external preferences and must be given a preferred status. By doing so we can protect 'the fundamental rights of citizens to equal concern and respect'.

Dworkins arguments are attractive because he minimizes the tension between liberty and equality. His theory seems to retain both the benefits of rights theory without the need for an ontological commitment and the benefits of utilitarian theory without the need to sacrifice basic individual rights.

## V - DEFINITIONS OF HUMAN RIGHTS

From the discussions made above, it is apparent that it is difficult to conceptualise human rights. Yet many scholars have attempted to define it in various terms, some of them are as follows:

- (i) Richard Wasserstrom defines human rights as ..... 'one ought to be able to claim as entitlements (i.e., as human rights) those minimal things without which it is impossible to develop one's capabilities and to have life as human being'<sup>114</sup>. That is human rights are moral entitlements possessed only by persons.
- (ii) Tiber Macham defines human rights as universal and irrevocable elements in a scheme of justice. Accordingly, justice is the primary moral virtue within human society and all rights are fundamental to justice'<sup>115</sup>.
- (iii) Joel Feinberg defines, human rights as moral rights held equally by all human beings, unconditionally and unalterably'<sup>116</sup>. That is for Feinberg human rights are moral claims based on primary human needs.
- (iv) Kant Baier defines human rights as, those moral rights whose moral ground and generating factors are the same, namely being human in some relevant sense'<sup>117</sup>.
- (v) Cranston asserts that, human rights by definition is a universal moral right, something which all people, everywhere at all times ought to have, something of which no one may be deprived without grave affront to justice, something which is owing to every human being simply because one is human'<sup>118</sup>.

114. Richard Wasserstrom, "Rights, Human Rights and Racial Discrimination", Melden (Ed.) Human Rights, (Belmont, California, 1970), p. 96-101.

115. Tiber Macham, *Prima Facie v. Natural (Human) Rights* 1976, *Journal of Value Inquiry*, No. 2, 119-131.

116. Joel Feinberg, "Social Philosophy", 1973, Prentice Hall, N.J., p. 85

117. Kant Baier, (Ed.) *Chapman, Human Rights, Nomos, XXIII*, 1981 New York Press, p. 19

118. M. Cranston, "What are Human Rights", 1973, National Academy, Delhi, p. 7.



# PUBLIC INTEREST LITIGATIONS: AN APPRAISAL

Dr.K.R.Aithal\*

Normally, judicial role has been understood to be resolving disputes among private parties which have not been privately settled. This conception of judicial role cannot account for much of what is actually happening in the present day courts. The form of adjudication has been considerably changed and it has been argued that "special and deviant forms of adjudication sometimes makes it possible to undertake through adjudicative process tasks that could not otherwise be handled satisfactorily through adjudication at all." On the other hand it is equally emphasized that certain deviant forms of adjudication are valuable and almost indispensable, though "their use is often attended by certain dangers."

At present, the judiciary and especially the Supreme Court, in India, is increasingly seen as the only surviving assurance of fair play and justice, and even as "the last resort for the oppressed and the bewildered". One may or may not want a government by the judiciary, but in certain respects it has been institutionalised in India. At the centre of this phenomenon lies the controversy concerning judicial role under the Indian Constitution. On going judicial activism in India, which was inaugurated during early 1980's through public interest litigations, some times described as social action litigation, has enhanced the visibility and prestige of the Supreme Court. The expansion in judicial role has its roots in the concept of judicial review, a concept essentially western in origin, incorporated into the Indian Constitution. Constitutionally guaranteed fundamental rights of the subjects and other Constitutional limitations on state power forms the basis of Judicial Review.

The Supreme Court has expanded the frontiers of fundamental rights and in the process "it has developed a new normative regime of rights, insisting that the state cannot act arbitrarily but instead act reasonably and in public interest, on pain of its action being invalidated by judicial intervention. The Supreme Court has also developed the innovative strategy of public interest litigation (PIL) for the purpose of making basic human rights meaningful for the large masses of people in the country and making it possible for them to realize their social and economic entitlements.

The impact of judicial activism aimed at liberating the poor and oppressed through judicial initiative was the enormous increase in the volume of public law litigation as opposed to private law litigation. Public law litigation no longer concerned with resolving private disputes according to principles of private law but it deals with individual or group's grievances over the administration of some public or quasi-public programme and also with public policies embodied in the governing statutes or constitutional provisions. The public law litigation in India is not only concerned with invalidating legislative and administrative measures on the ground of unconstitutionality or illegality, but also concerned with protecting interests of the poor and disadvantaged by creating and enforcing legal entitlements. The law suits through which grievances against Government and the administration is espoused is described as public interest litigations (PIL) and now a days PIL occupies the large portions of public law litigations going on in appellate courts.

## I. EMERGENCE OF PIL IN INDIA

It is claimed that soon after 1975-77 Emergency, a new kind of litigation entered the landscape of constitutional adjudication in India. It was referred to as Public Interest Litigation (PIL) "The term is American but the phenomenon that the term sought to describe

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was distinctly Indian". To emphasize its distinctiveness, it has been insisted that the correct term to describe the phenomenon is "social action litigation".

It is heartening to note that PIL was greeted and appreciated in India by academicians, particularly legal academics, social activists and to a certain extent public at large. It has been claimed that PIL contains all the possibilities of silent revolution, it made the courts to take suffering seriously, it created "a new-juristic horizon" in that "new jurisprudence was being developed to suit modern conditions", it created a major break through in the delivery of social justice and it was seen as an "institution for the delivery of socio-economic justice in India". It is also observed that PIL represents revolutionary transformation, which challenge even the most sacred idea and themes underlying traditional judicial process. Now the debate on PIL in India, is focusing on whether it is a reform or a revolution. But at the same time it should be noted that some have joined the fray to attack PIL on the ground that it was a strange new development inconsistent with the rule of law as they understood it. And also a few held that PIL challenged the received tradition of judicial process, perhaps, on the ground that there exist vast differences between PIL and private law litigation.

## II. SCOPE OF PUBLIC INTEREST LITIGATIONS IN INDIA

PIL was inaugurated in India by some Supreme Court Justices with the active co-operation of social activists interested in espousing the cause of poor and the oppressed. It represents a sustained effort on the part of the highest judiciary to provide access to justice for the deprived sections of Indian humanity.

The first phase of PIL in India was concerned with the conditions in which men, women and children were incarcerated in prison and other places of detention. The first typical PIL was filed by an activist advocate which was based on a series of articles in a national daily, the *Indian Express*, exposing the plight of Bihar under trial prisoners. It has been pointed out that the final outcome of such writs did not result in the Court developing a criminal due process, even though it made rapid strides in advancing a much more rigorous review of administrative action.

Second phase was concerned with questions of social justice and positive rights. In a series of cases concerning bonded labourer, conditions of work and pay of unorganized labourers, plight of poor peasants, pavement dwellers, street hawkers and a host of others the Court made attempts to render justice. The following illustrations are noteworthy.

*Bandhua Mukti Morcha v. Union of India*, a case concerning bonded labour the Court directed both the Central and State Government to chalk out some programmes to release and rehabilitate bonded labourers in accordance with the provisions of the *Bonded Labour Abolition Act 1976*. But the Court at the same time observed that it has no jurisdiction to frame any scheme for the purpose of rehabilitation. However, in *Neeraja Chandhary v. State of M.P.*, Justice **Bhagwati** (as he then was) held that Articles 21 and 23 of the Constitution would not only require identification and release of bonded labourers, but also their rehabilitation on release. The directions were issued to chalk out programmes or schemes for rehabilitation and its supervision by a vigilance committee in which persons suggested by the Court were to be taken as members.

*Olga Tellis v. Bombay Municipal Corporation*, a case concerned with eviction of pavement dwellers and slum dwellers from the streets in Bombay. The Court while recognizing a right to livelihood asserted that, in the interest of justice, before evicting slum dwellers government must provide them alternative accommodation as far as possible or otherwise some other sort of relief should be made available to them.

Similarly in *M.C. Mehta v. State of Tamil Nadu*, through the supervision and direction of the Supreme Court a fairly successful attempt to ameliorate the conditions of child labourers in match industry was undertaken. Further, in *Unni Krishnan v. State of A.P.*, the court, while declaring a fundamental right to primary education gave a series of directions to improve access to higher education. Further, during this phase of PIL the Court also examined the questions of legal entitlements of the poor environmental issues and the like. At this point, PIL was regarded as directly concerned with the predicament of the poor and the disadvantaged. But Indian PIL soon transcended its earlier self imposed limitation of considering and enlarging the cause of the disadvantage. It was extended to promote a range of public causes including the manner in which High Court Judges could be transferred and the corruption of politicians could be dealt with.

Thus in the third phase, the supreme executive discretion was brought under judicial scrutiny and the Court took cognisance of petitions seeking to expose political corruption and abuse of power by high political functionaries. By this time political elite started opposing judicial activism, which culminated in an unsuccessful attempt to enact a law regulating public interest litigations. In spite of such an attempt to curb PIL it has become part of the present day judicial process in India.

### III. NATURE OF PUBLIC INTEREST LITIGATION

Justice P.N.Bhagwati, in *Judges Transfer case*, while defining the nature PIL in India, observed:

"Where a legal wrong or injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability, or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for appropriate direction, order or writ in the High Court under Article 226 and in case of breach of fundamental rights of any such person or determinate class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such persons or determinate class of persons".

Further in another case he also observed that the Court can be moved for the above purpose by a member of the public by addressing a letter drawing the attention of the Court to such legal injury or legal wrong. The Court would cast aside all technical legal rules of procedures and entertain the letter as a writ petition on the judicial side and take action upon it.

The above observations provide for the following elements concerning the amplitude of PIL in India. Firstly, PIL is concerned with any legal wrong or injury or, legal burden caused or threatened to be caused to a person or to a determinate class of persons. Secondly, a person or a determinate class of person was by reason of poverty, helplessness or disability or socially or economically disadvantaged position cannot himself claim relief before the courts. Thirdly, any member of the public can maintain an application for appropriate directions, order or writs on behalf of the such a person or class of persons. Fourthly, the High Court can be moved for an infraction of any right while the Supreme Court can be moved in case of violation of fundamental rights. Fifthly, the Court can issue any direction, order or writ for the redressal of grievances and this may include directions for affirmative actions and continuous monitoring. Lastly, the Court can be moved by a member of the public even by addressing a letter which the Court could convert into a writ petition.

The above elements of PIL developed by Justice **Bhagwati** has not been unanimously accepted by the judges of the Supreme Court. Some judges like Justice **Venkataramaiah**, **Fazal Ali** appears to have not accepted all the elements, whereas Justice **R.N.Mishra** expressed an adverse opinion to which Justice **Bhagwati** himself concurred in *Nulla Thampy Thera V. Union of India*. Justice **R.N.Mishra**, while refusing to issue any directions observed: "Giving directions in a matter like this where availability of resources has a material bearing, policy regarding priorities is involved, expertise is very much in issue, is not prudent and we do not therefore propose to issue directions".

#### IV. DISTINCTIVE FEATURES OF PIL IN INDIA:

It has been asserted that judiciary led PIL in India posses certain distinctive features each of which is not novel and in some they may be cases contrary to the traditional legalistic understanding of judicial functions. The principal distinctive features include, (a) liberalization of the rules of *locus standi*, (b) procedural flexibility and adoption of non-adversarial procedures, and (c) remedial flexibility and an going judicial participation and supervision.

##### *The Doctrine of Locus Standi*

Traditional understanding of litigation requires, that the participants must have some real interest to promote through the lawsuit. The American Supreme Court has repeatedly relied on standing to reject PIL lawsuit without consideration of the merits. Usually, narrow approach to standing has been justified by flood gate arguments, the desire to exclude court birds (Meddlesome interlopers) and the unwillingness or inability of the courts to adjudicate on matters that are best left to the discretion of policy makers, attorney generals and others so called guardians of the public interest.

American law presumes that only someone with a personal stake can approach courts. The Indian Supreme Court rejected that presumption by allowing any member of the public to seek judicial redress for a legal wrong caused to a person or to a determinate class of persons who by reason of poverty, helplessness or disability or socially or economically disadvantaged position "is unable to approach the Court directly. This doctrine of 'representative standing' has been extensively used in India to enhance access to justice to the poor and oppressed and to encourage social action by empowering representatives to approach the court on behalf of the poor and oppressed.

The doctrine of standing articulated in *S.P. Gupta ( Judges Transfer Case )* sometimes described as a 'citizen standing' where in any member of the public with sufficient interest in the subject matter by alleging sufficient injury to the public interest can approach the Court. The Court also said that such a rule of standing is essential to maintain rule of law and to prevent official lawlessness. Here it is said that the Indian doctrine of *Locus Standi* is much broader than American concept of class action. Another important aspect of the doctrine is that the two doctrines of standing appear to be merged into a single doctrine of 'public interest standing'. This is evident from the following observation of the Court, which says:

"While public interest litigation is brought before the court not for the purpose of enforcing the right of the one individual against another, as happens in the case of ordinary litigation, it is intended to prosecute or vindicate public interest which demands that violation of constitutional or legal rights of a large number of people, who are poor, ignorant or socially and economically in disadvantaged position, should not go unnoticed, unredressed for that would be destructive of the rule of law".

It has been pointed out that if there is one PIL fact on which there is virtual unanimity, is that the rule of *Locus Standi* is to be liberalised. With the change in the character and function of the state, it has become necessary that any member of the public having sufficient interest could maintain an action for judicial redress of public injury, provided that the petitioner acts *bonafide* and is not moved by an oblique motivation. The liberty action of the rule of *locus standi* lie at the root of judicial enforcement of positive rights because such rights are concerned with welfare entitlements of the poor and oppressed.

### ***Procedural Innovations***

The Indian judiciary has shown willingness to alter the rules of procedure wherever necessary to render justice. Actions may be initiated not only by way of formal petitions, but also by way of letters addressed to the courts or judges who may choose to treat it as petitions. Letters written by individuals acting *pro bono publico* have been converted into writ petitions. Justice V.R.Krishna Iyer and Justice Bhagwati, have used the expression "epistolary jurisdiction" to denote this procedure. A letter written by a prisoner in Tihar Jail complaining inhuman torture by Jail warden was admitted as a writ of *Habeas Corpus* petition under Article 32. Letters written by the Free Legal Aid Committee at Haribagh were treated as writ petitions. A letter written by an organizations to one of the judges of the Supreme Court drawing attention to the inhuman conditions faced by the stone quarry workers in Feridabad was converted into a writ petitions.

The practice of converting letters into writ petitions and encouraging such letters by some activist judges of the Supreme Court has been objected to on several grounds. They include, (a) show of some soft corner towards some petitioners, (b) may lead to the growth of factionalism among judges, (c) may induce further docket explosion and may encourage bench fixing or shopping for judges. Against such criticisms it is contended that they are based on a highly elitist approach and proceeds from a blind obsession with rites and rituals sanctified by an out moded Anglo-Saxon jurisprudence.

Perhaps, the most visible departure from established procedure occurred in cases involving *suo moto* intervention by the Court. Justice M.P. Thakkar, as a judge of the Gujarath High Court converted a letter to the editor in a newspaper into a writ petition. This practice has been appreciated by some people on the ground that it represents a major break through in the delivery of social justice. But some others have objected to such practice because it has a tendency to convert justice according to law into justice according to judge's discretion. Even the Supreme Court has expressed its reservations at the High Court's exercise of *suo moto* power as the source of such a power is not clear

### **V. LIMITATIONS OF PUBLIC INTEREST LITIGATIONS**

Ever since the decision in *Marbury*, the notion of judicial supremacy and judicial review have been highly controversial and debatable issues in constitutional theory and practice. It is always claimed that judicial power must be subject to constitutional, statutory and other, limitations. In United States these limitations would come to the forefront whenever the courts while interpreting the Constitution produced serious errors regarding meaning and demands of the constitutional text which resulted in unexpected consequences. The racial cases of 1955, the economic decisions of the earlier part of the twentieth century and the crisis of constitutional adjudication in the first years of New Deal were "obvious candidate for the title of serious constitutional mistakes". These events paved the way for the doctrine of minimum judicial interference in the social and economic matters. However, at times, it has been claimed that this doctrine of minimalism and judicial deference have adversely affected the interests of the poor and other.

### *Limits to Judicial Review of Legislative and Administrative Actions*

The justification for judicial review, as has been pointed out, lies in the supremacy of the Constitution and in the need to protect liberty against majority oppression. **Thomas Jefferson**, though initially supported judicial review as a means of harmonizing the federal system, vehemently argued against it. **Jefferson's** opposition was based on two major concepts. Firstly, it violates the constitutionally mandated theory of separation of powers. Secondly, it represents a patent denial of popular will, the majority will, as expressed by the sovereign people through their duly elected representatives. Accordingly, he asserted that the doctrine of judicial review, with its inherent possibility of leading to judicial supremacy was both elitist and anti-democratic. But at the same time it should not be forgotten that all branches of government have their undemocratic aspects as well.

Justice **Cordozo** firmly believed in the power of judicial review but reiterated that it must be employed cautiously and sparingly. His key contention was that "it is the restraining influence of its presence rather than the frequency of its application that render judicial review so vital to the governmental process in the United States of America". Though, the notion "the Constitution is what the Supreme Court says it is", was very popular but it is always asserted that the Court cannot bind other branches of the government. Nevertheless, it has been insisted that both constitutionalism and judicial review embody the goal of settlement of issues to which people disagree and the co-ordination function of law requires not only an obligation to obey the law but also an obligation to obey a single authoritative interpreter of the law. The interpretative supremacy of the judiciary does not mean absolute supremacy of judicial power.

In general, judicial review is subject to three classes of limitations. Firstly, the Constitution provides a mechanism whereby a judicial decision can be nullified through amendment to the Constitution. But it has been argued that restraining judiciary through amending process is a non-serious and impractical one as it is very difficult to secure an amendment. Secondly, inter departmental checks based on separation of powers is more valuable and practical. Through legislations the Congress can minimize the impact of particular decisions of the Court. Here is the danger of the Court overturning such legislations on the ground of unconstitutionality. Thirdly, the real limitation on the power of judicial review is judicial self restraint.

Time and again judges themselves asserted that the courts shall not decide certain disputes or judicial power shall not be exercised in certain ways. The courts normally justify certain kinds of non-exercise of power when called upon to do so on the ground of judicial self restraint. The American Supreme Court has developed a host of unwritten laws, practices, precedents, and attitudes which may be viewed as a code of conduct for the judges which are called maxims of judicial self-restraint. These maxims were developed by the Court by gracefully accepting their place among other departments of the government. But these maxims have not been consistently applied in practice; yet, they have a bearing on judicial enforcement of positive rights.

### *Comparative Competence Difficulty*

The most important limit or weakness of judicial process is institutional incompetence. This arises from the fact that "judges are badly equipped for doing personal research especially that kind of research which goes beyond statutes and precedents and often involves complicated social, economic and political problems and data, and judiciary lacks those aids which legislations, Law Commissions and governments can muster in order to have that kind of research done for them". However, it has been argued that the gravity of the problem of institutional incompetence can be attenuated by an increased use of expert

testimony, *amicus curie* briefs as well as expert lay persons acting in an adjudicatory capacity.

### ***Enforceability of Judicial Orders***

Once, former United States President Jackson made a remark that "John Marshall has made a decision, let him enforce it". This statement envisages that judicial orders are not automatically enforceable. Accordingly, it is observed that "if the state agencies are not enthusiastic in enforcing court orders and do not actively co-operate in that task the object and purpose of PIL would remain unfulfilled". The consequence of the failure of the state machinery to secure enforcement of court orders would only be to deny effective justice to the poor and disadvantaged on whose behalf particular PIL is brought, but it also would have a demoralizing effect and people may lose faith in the capacity of PIL to deliver justice.

The Supreme Court, with a view to evolve a methodology for securing enforcement of court orders in PIL, started appointing monitoring agencies. In a case pertaining to protection of women in police custody, the Court issued various directives and asked women judicial officers to visit police lock-ups periodically and report to the High Court whether the directives were being carried out. Similarly in *Bandhua Mukti Morcha*, the Court gave elaborate directions and with a view to securing implementation of these directions, the court appointed the Joint-Secretary in the Ministry of Labour to visit stone quarries and to ascertain whether the directions given by the Court had been implemented or not.

However, it is also observed that while formulating a scheme of affirmative action and while giving directions due regard ought to be given by the Court to the 'potential for successful implementation' and the likelihood and degree of response from the implementing agencies. Enforceability of the orders, directions or judgments of the Court depends upon their nature and the rights to which they relate. It has been claimed that orders or directions relating to specific obligation can be easily enforced, whereas the obligation to ensure the enjoyment of a right in continuity, e.g. the enforcement of labour laws, in future, cannot be effectively enforced by the Court. Even regarding payment of legitimate wages the Court was hardly in a position to ensure observance of its orders, as in one case, that the *Jamadars* should cease deducting Rs.1/- per day. The *Jamadars* would easily find ways of evading it. In *Bandhua Mukti Morcha*, the Court has itself recognized that the State of Haryana did not make provision for drinking water at the site of stone quarries though it had agreed to do so.

### **VI. EFFICACY OF PIL**

It has been observed that the Court through public interest litigation might have secured a better life for some individuals, but it has not ended bonded labour nor found homes for the pavement dwellers. Litigative strategies can never substantially redistribute wealth or power, nor penetrate and alter the economic and cultural conditions, which define the reality of life. Accordingly, critics and social activists have questioned the utility of expending scarce human and financial resources on litigations because they might think that the reach of the judiciary is limited. This is so because "judicial activism cannot be a substitute for executive efficiency" and in a welfare state it is the responsibility of executive to implement welfare legislations. Further, social and economic change in a society "organized around privilege, patronage and power cannot be brought about just by a few PIL actions, howsoever, well intentioned. In this regard one PIL activist observed:

"For the downtrodden of the world, we secure their rights by law, exactly as though they had the same privileged background as us, and then, outside the Court room we leave them to their separate ways. Ours is not, however, the universe which they inhabit. Their grim, hostile world, which recedes while we are present, returns with a vengeance. This is why our legal victories

turn out to be both pyrrhic and dangerous to the poor. There is real danger if legal activists continue to interfere haphazardly, on a short term case wise basis with the lives of the downtrodden. It is time we learn that it is not enough to expose the innumerable and appalling social evils through the courts and the media. We must linkup with social activists who alone can provide them the ground support",

Thus PIL can only be a part of the total strategy of the social activist, to be meaningful only when PIL is supplemented by non-legal means by which information is disseminated, groups are supported and educated and pressure is brought to bear upon the responsible authorities to comply with Court orders then successful results may be achieved. Accordingly, the Court has observed that until the attitudes of administrators changed, the on going efforts of social activists on the ground remained the crucial link in ensuring the fundamental rights of citizens.

There are two other concerns, perhaps, exaggerated which have a bearing on judicial activism. The first is concerned with attempts at abuse of PIL by pseudo-public spirited activist and the need to discourage them. In this regard the court observed: "[T]he Court cannot close its eyes and persuade itself to uphold publicly mischievous actions which have been so exposed. When arbitrariness and perversion are writ large and brought out clearly, the Court cannot shirk its duty and refuse its writs".

The second is the manner in which litigation may be initiated and the activism of judiciary in prosecuting such cases raise the spectre that litigants are shopping for particular judges and that the judges are shopping for particular issues and causes.<sup>1</sup> The one consequence of this is that the judges bring political 'bias' to bear on a case.

## VII CONCLUSION

PIL has its roots in the ever-expanding judicial role and in the on going judicial activism in India. It can be said that the failure of democratic institutions to live up to the expectations of the citizens, particularly in protecting the legitimate interests of the poor, the under privileged and the disadvantaged sections of the society, and the popular resentment against that failure paved the way for the judiciary to become active and to respond to the demands of the needy. This role is being promoted by social activists and some activist members of the bench and the Bar.

Judicial assumption of this new role has challenged certain assumptions underlying judicial process. The Supreme Court is able to establish its legitimacy on the basis of constitutional ethos and values. The principal method by virtue of which the Court has promoted the interest of the poor and oppressed was PIL. The Court is yet to develop effective methods and strategies to solve the problems thrown up from time to time by PIL. There can be no doubt, however, that public interest litigation is one of the most powerful weapons invented by the Court for the purpose of delivering distributive justice to the disadvantaged groups of people.

# GOOD GOVERNANCE AND ACCOUNTABILITY TO THE PARLIAMENT AND STATE LEGISLATURES

Dr.K.R.Aithal\*

It is often claimed that, even after six decades of independence and Constitutional governance, Indian democracy is at cross roads. Its survival is threatened by concentration and abuse of power, ineffective and unaccountable civil service, corruption, criminalization of polity and society, poverty, illiteracy and the like. However, during the past sixty years India is able to build fairly stable and viable democratic traditions and structures but its record in respect of establishing an effective system of institutionalized accountability is far from satisfactory. In a well functioning democracy, the political process would find answers to governance problems but this is not happening in India.<sup>1</sup> All organs of the government are affected by the malaise of bad governance, and political executive, legislature, bureaucracy and the judiciary cannot escape responsibility.

The vicious cycle of political distortions appears to be the prime cause of the malady. It is often asserted that success of a democracy lies in realization of its key principles incorporated in the Constitution. But after *Nehru Era* elements not committed to basic Constitutional values and democratic principles began to operate the system may be due to the fact that, at times, democratic structure easily allows them to operate. These elements always tend to disregard basic norms of democracy and commitment to democratic principles and fail to establish a system of accountability so that they can promote their selfish interests by institutionalizing power without responsibly.<sup>2</sup>

Good governance being the need of the hour, rests on institutionalization of accountability and key issues underlying the concept of accountability are administrative responsibility towards political executive, executive responsibility to the legislatures, legislatures responsibility towards the aspirations of the people as a whole and lastly,

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<sup>1</sup> S.C.Saxena "Improving Service Delivery" at <http://Google.com> visited on 24.2.2006

<sup>2</sup> Upendra Baxi, *Crisis in Indian Legal System*, (Delhi; Vikas Publication, 1985), p.27.

judicial accountability, which lies in its commitment to Constitutional goals and aspirations. Accordingly, this paper focuses on the need for institutionalizing the concept of good governance, the relationship between good governance and accountability, how far Parliament and legislatures being repository of public power are able to hold the executive and the administration accountable and other related issues.

### **Good Governance:**

It must be admitted that there is widespread disenchantment with the functioning of the state governments and also the central governments. Common man sees the governments to be exploitative and they epitomize corruption, inordinate delays, long-winded procedures lack of transparency and extreme rudeness and insensitivity, often bordering callousness.<sup>3</sup> The foremost test of good governance is the respect for rule of law and it is unfortunate that even after six decades of independence one cannot say with confidence that the governance in most states is based on rule of law.

Any discussion on good governance must focus on the primary responsibilities of the government. They must include the maintenance of law and order, administration of justice, and welfare of economically and socially weaker sections of the society in terms of provision for safety net for them. The government will also have to take the responsibility for provision of primary education, public health, and water supply, particularly in the rural areas and semi urban areas. Here again it is seen that, in its anxiety to do thousand and one things, these primary responsibilities have been neglected over the years.<sup>4</sup>

It has to be admitted that the governance in India has not been changed much though over sixty years has elapsed since independence. It has been observed that some gestures have been made and noises such as adoption of citizen's charter, passing of (retrograde) laws on right to information, mouthing the platitudes of downsizing of the government and promoting the mantra of public accountability and transparency. But the impact of these measures is hardly perceptible to the common man. An attempt is being made to ensure transparency through the Right to Information Act, 2005, and in the direction of institutionalizing accountability attempts have been made by the judiciary

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<sup>3</sup> Report of the One Man Committee on Good Governance (Bombay: Govt. of Maharashtra) p.5.

<sup>4</sup> *Id.* at p.7

through public interest litigation to hold the executive responsible and some attempts also have been made through strengthening of the institutions of Lok Ayukta in states and the Lok Pal at the centre. However, primary concern here is to elucidate the executive and administrative accountability to the Parliament and state legislatures and before analysing the issue it is better to consider the concept of accountability.

### **The Concept of Accountability:**

The notion of accountability is admittedly very complex. At a very basic level it may be defined as the ability of one actor to demand an explanation of another actor for its actions and reward or punish that actor on the basis of its performance or its explanation.<sup>5</sup> The important question here is why we care about accountability. Unless we could not hold actors whose actions impinge upon our lives accountable it is very unlikely that our core interests, however, defined will be protected. Further, the concept of accountability requires delineating lines of authority; who should hold whom accountable and what terms? Even if we have an answer to this question, there is the practical challenge of designing institutions that make accountability an effective notion through which a system of sanctions and rewards are established.

Democratic Constitutions require that the Government to rest on the ethic that people in positions of power take responsibility for the actions. Accountability is about responsibility, the responsibility to answer for their actions. Accordingly, "accountability has been defined as a process where a person or group of persons are required to present an account of his activities and the way in which they have or have not discharged their duties... the difference between accountability and responsibility is culpability".<sup>6</sup>

The Constitutional scheme contemplates responsibly of the various actors and five types of accountability can be inferred namely; administrative accountability to the political executive, executive responsibly to the Parliament and state legislatures, executive and administrative accountability to the political executive, executive and administration accountability to the courts and to the quasi judicial institutions such as

<sup>5</sup> Pratap Banu Mehta, "Citizenship and Accountability: The case of India" in [cpr@vsn.com](http://cpr@vsn.com) visited on 5.3.2008.

<sup>6</sup> Matthew Flinders, *The Politics of Accountability in the Modern State* (Burlington: Ashgate Publishing Ltd., 2001) p.12.



central vigilance commission, Lok Ayuktas and others; and judicial accountability and lastly democratic accountability i.e accountability to the people.

Administrative accountability to the political executive, it appears, is seriously eroded by the influence of political culture built on such aberrations like, "Lick up and kick below" and "rules are for fools", in spite of the fact that there are elaborate rules to hold administration accountable to the legislatures and to the courts through judicial review of administrative actions. It is also pointed out that, at times, the courts fail to hold the administration accountable because of the excessive Constitutional protection granted to the civil servants.<sup>7</sup> Apart from the above there is inward accountability which generally refers to the hierarchy and is mostly ineffective because it dependants on individual conscience and his ethical base. Accordingly, Socrates, Confucius and the Buddha placed emphasis on individual virtue and enlightenment. The more power or authority one possesses, the greater too, is the responsibility to use it wisely. But in modern materialistic world it is difficult to expect such an exemplary conduct from greedy public officials and politicians. Outward accountability implying control and review by other agencies is most effective provided these agencies act properly.

The concept of legislative accountability has at least two dimensions one referring to its own ability to hold executive and the administration responsible to it. The other its own commitment to Constitutional values and in turn confirming to popular will. This largely depends on the structure and composition of the Parliament and legislatures, and quality and character of its numbers and their commitment to democratic principles.

The judiciary, being an institution designed to hold other actors accountable, must be highly responsible and independent. The concept of judicial accountability involves to what extent judges are held responsible to the judgments they render. There are instances where judgments are rendered even at the High Court level in such a way that orders appears to have been passed in favour of both the parties to the litigation. Outward responsibility is sometimes considered to be inimical to the independence of the judiciary. Whereas inward accountability depends on the control exercised by the higher judiciary and individual judges.<sup>8</sup>

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<sup>7</sup> Arun Shories, *Courts and the Judgments* (New Delhi: ASA Publications, 2005), p.28.

<sup>8</sup> *Ibid.*

Lastly, democracy contemplates accountability to the people but it is very difficult to translate this principle in to reality yet sincere attempt is worth making. This concept has to be institutionalized through the legislatures. Democratic structure and Constitutional scheme provide for internationalization of the concept but in reality concept has not been institutionalized and the next part focuses on these issues.

#### **Accountability to the Parliament and State Legislatures:**

The National Commission to review the working of the Constitution, while emphasizing the need to reform Parliamentary institutions asserted that “in Parliamentary polity the legislature has to provide from within itself a representative, responsible and responsive government to the people, one way to judge whether the system is working well or not is to see whether it has brought into being governments that last their terms and succeed in providing good governance to the community”.<sup>9</sup> The commission has also observed that the functioning of the Parliament and state legislatures has to be reviewed from time to time so that the government is responsible to the legislatures and the Parliament and state legislatures are responsible to the people.

Good governance, it was hoped, would transform the social, political and economic life of the people, within the framework of democracy. At the commencement of the Constitution government worked more or less to the satisfaction of the people, however, as time passed the governments lost their lost their élan as they have failed live upto the expectations of the Constitution to give real substance to the policies designed to promote social well being. Even the modest expectations have remained unfulfilled.

The present situation is characterized by a perverse disenchantment with the way things have worked out. It is futile to debate whether it is the institutions provided by the Constitution that have failed or whether men who work these institutions have failed. It is only through institutional reform by which men and women in power are effectively held accountable it is possible to ensure socio-economic goals.

Inability to ensue the socio-economic goals cannot be attributed to scarcity of resources but to the failure of governance. It is the failure to hold administration accountable by the Parliament and state legislatures appears to be at the root of the

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<sup>9</sup> Report of the National Commission to Review of the Working of the Constitution (2002), Govt.of India) pp 227-30.

problem. Before analyzing the ability of the Parliament and state legislations to hold the administration accountable it is better to make a brief account of Constitutional basis of accountability.

**Constitutional basis of accountability:** The Constitutional scheme provides that the President and Governor are custodians of all executive and other powers but exercise their formal Constitutional powers only upon and in accordance with the advice of their ministers save in a few well-known exceptional situations. These exceptional situations relates to (a) the choice of Prime Minister or the Chief Ministers, restricted though this choice is by the paramount consideration that he should command a majority in the house; (b) dismissal of a government which has lost its majority in the House but refuses to quit; (c) the dissolution of the house where an appeal to the electorate appears to be appropriate.<sup>10</sup>

The Constitution also incorporates the collective responsibility of ministers by providing that the Council of Ministers is responsible to the Lok Sabha or House of People not as individual alone but collectively also. Similarly, Council of Ministers in the state are individually and collectively responsible to the Legislative Assembly. The entire cabinet will normally accept responsibility for the acts of any of its members, so that the censure of one will become the censure of all. The object of collective responsibility is to make the whole body of persons holding ministerial office collectively and vicariously responsible for such acts of other as are referable to their collective volition so that even if an individual may not be personally responsible for it, yet he will be deemed to share the responsibility with those who may actually be responsible for it. In other words, as the Council of Ministers is able to stay in office only so long as it commands the support and confidence of a majority of members of the House, the whole Council of Ministers must be held to be politically responsible for the decision and policies of each of the ministers and of his department which could be presumed to have the support of the whole of the ministry. Hence, whole ministry will on issues involving matters of policy, have to be treated as one entity so far as its answerability to the House is concerned. The whole question of responsibility is related to the continuance of a

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<sup>10</sup> Mahandra P. Singh (ed.) V.N.Shukla, *Constitution of India* (Lucknow: Eastern Book Co. 2006) pp 339-357.

minister or a government in office, and the only sanction for its enforcement is the pressure of public opinion expressed particularly in terms of withdrawal of political support by members of the legislature. The above scheme of collective responsibility may not always be effective therefore the Supreme Court in *Common cause, A Registered Society v. Union of India*,<sup>11</sup> observed that "in spite of the fact that the Council of Ministers is collectively responsible to the house of the people, there may be an occasion when the conduct of a minister may be censured if he or his subordinates have blundered and have acted contrary to law". Thus an action of a minister could be subject to judicial scrutiny even if it was not raised in the House of people. It appears that the Constitutional scheme of executive accountability depends on the ability of the Parliament to censure erring ministers. The accountability function of the Parliament largely depends on its structure and the individuals comprising it.

***The Structure of the Parliament and State Legislatures:*** It is often said that the Indian Parliament and state legislatures consisting primarily of self-serving professional politicians, are not incapable of shouldering Constitutional responsibilities and also hold the administration accountable. The reasons for this malady are many but structural perversions, emergence of certain wrong notions and the inability of the electoral process to yield persons who have the necessary competence, integrity and dedication to govern a billion people appear to be prominent.

Firstly, there is no structure that cannot be perverted and the democratic structure often allows those who do not believe in key democratic principles to operate the system. Today, there is increasing control of the executive over the Parliament. It is the party influence and factors such as issue of whips and anti defection law, excessive perks and privileges of members and MP's and legislators Local Areas Development Funds prevents the members from acting independently.

Secondly, the democratic process over a period of time paved the way for emergence of certain wrong notions such as 'people are sovereign' and the like. These notions allow the executive or political class to act arbitrarily in the name of the sovereign people. For example, Hitler while justifying his order resulting in killing of 67 members of his own party in the meeting itself for opposing his propaganda claimed

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<sup>11</sup> (1999) 6 SCC 667, 7000.

that at that time he was acting as chief justice of the Gen man people. Many such acts though lesser in degree are often justified in the name of sovereign people unless the legislature is able to check the executive action effectively.

Thirdly, our electoral process is not yielding competent persons to govern the country. In this regard it has been observed:

“persons strive to enter legislatures not because they have any particular competence for legislation or for assisting policies or even any special interest in these. Among the reasons for which they do so are that entering the legislature is the stepping stone to becoming a minister, entering the legislatures can help shield one from law, doing so confers several benefits - salaries, allowances, fees for attending sessions and committee meetings, free accommodation, free telephone services, free travel, subsidized food... all the way to life long pensions. In addition, as recent disclosures have shown there are co-curricular windfalls from voting for or against a government, recall J.M.M. bribery cases and to what may be skimmed from MPLADS; to what may be charged for asking questions....”<sup>12</sup>

Accordingly it is very difficult to expect from such members to hold the administration accountable.

Fourthly, the Parliament and state legislatures often lose their credibility in the eye of the common man due to the criminalization of politics. The Commission to Review of the working of the Constitution, on the basis of the Report of N.N.Vohra Committee set up to nail the versus between criminals, politicians and the administration, observed:

“The entry of criminals in politics is a matter of great concern. The Vohra Committee appointed by the Government had stated in strong terms that the nexus between crime syndicates and political personalities was very deep. According to the Central Bureau of Investigation (CBI) Report to the Vohra Committee: ‘all over India’, crime syndicates have become a law unto themselves... Even in smaller towns and rural areas,

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<sup>12</sup> Arun Shourie, *The Parliamentary System*, (New Delhi; ASA Publications, 20007) p.13.

muscle-men have become the order of the day. Hired assassins have become part of these organisations. The nexus between the criminal gangs, police, bureaucracy and politicians has come out clearly in various parts of the country...' The Report also says in certain States like Bihar, Haryana and Uttar Pradesh, these gangs enjoy the patronage of local politicians cutting across party lines and the protection of the functionaries. Some political leaders become the leaders of these gangs /armed *senas* and over the years get themselves elected to local bodies, state assemblies and the national Parliament".

The Vohra Committee has reported in 1993 nothing happened until tandoor-murder, but there after only a summary of Report was presented before the Parliament. It was meaning less and fragment- every detail had been excised. No wonder, the cancer has gone on spreading. At first, political parties take occasional help from criminals and armed groups; say at the time of elections to intimidate the voters. Then they being turning to them for regular exactions the two sets becoming business partners and they enter politics and contest elections. They wins, the policemen who are chasing than will become their security personnel".<sup>13</sup>

Fifthly, as pointed at by Edmund Burke elections are instituted to promote certain good purposes namely, the establishment of a Parliament or legislature reflecting the main trends of opinion within electorate, a government according to the wishes of the majority of the electorate, a method of election of representatives whose personal qualities best fit then for the functions of the government, strong and stable governments and a healthy democratic polity which promote natural integration and social cohesion A system which achieved all these ends, or at least as close as possible to fulfilling each can be regarded as suitable to any democratic society. The present system 'first past the post' has failed to a great extent but no attempt worth the name to reform it is initiated so far. The system is neither representative nor able to yield persons with necessary competence to rule.<sup>14</sup>

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<sup>13</sup> *Ibid.*, at p.27.

<sup>14</sup> *Ibid.*

Lastly, failure of accountability function of the Parliament and state legislatures can attributed to lack of political will and at times legislatures including Parliament has passed legislations apparently to please some interest groups without any intention of implementing it. For example, the Benamy Transaction Prohibition Act, which was enacted in September 1988 has not been implemented till 2005 as its implementation requires the government to make rules for confiscation of property and the same has not been made by the government.<sup>15</sup> The Parliament was ineffective to hold the government responsible for early making of rules. There are several such instances which demonstrate the inability of the legislatures to hold the executive accountable.

### Conclusions

Indian democracy, though structurally stable functionally ineffective because it is not able to provide a good government to the people. Good governance, it appears, depends on institutionalization of the concept of accountability. Democratic set up naturally emphasises executive and administrative accountability to the Parliament and state legislatures. However, in the recent years, ability of the Parliament and state legislatures to hold executive and the administration, accountable is diminishing. The party influence, criminalization of politics and administration, inability of electoral process to yield persons who are best suited to govern and character and integrity of the legislators appears to be responsible for this state of affairs.

Institutionalization of accountability must begin with legislative and electoral reforms and reinforcement of institutional accountability. This can be done through strengthening of constitutional institutions such as judiciary and others like National Human Rights Commission, Lok Ayukta and the like. Institutional accountability though appears to be inimical to the democratic principle of accountability to the Parliament and to the people as these democratic institutions have failed to live up the expectations of the Constitution there is no alternative.

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<sup>15</sup> N.Vittal, "Mechanism For Accountability and making justice More Citizens Friendly speedier and in expressive" <http://Google.com> visited on 5.3.2008.

## Pursuing Equality in the Land of Hierarchy: An Assessment of India's Policies of Compensatory Discrimination for Historically Disadvantaged Groups\*

Independent India embraced equality as a cardinal value against a background of elaborate, valued and clearly perceived inequalities. Her constitutional policies to offset these proceeded from an awareness of the entrenched and cumulative nature of group inequalities. The result has been an array of programmes that I call, collectively, a policy of compensatory discrimination. If one reflects on the propensity of nations to neglect the claims of those at the bottom, I think it is fair to say that this policy of compensatory discrimination has been pursued with remarkable persistence and generosity (if not always with vigour and effectiveness) for the past thirty years.

These compensatory discrimination policies entail systematic departure from norms of equality (such as merit, evenhandedness, and indifference to ascriptive characteristics). These departures are justified in several ways: first, preferential treatment may be viewed as needed assurance of personal fairness, a guarantee against the persistence of discrimination in subtle and indirect forms. Second, such policies are justified in terms of beneficial results that they will presumably promote: integration, use of neglected talent, more equitable distribution, etc. With these two—the anti-discrimination theme and the general welfare theme—is entwined a notion of historical restitution or reparation to offset the systematic and cumulative deprivations suffered by lower castes in the past. These multiple justifications point to the complexities of pursuing such a policy and of assessing its performance.

India's policy of compensatory discrimination is composed of an array of preferential schemes. These programmes are authorized by Constitutional provisions that permit departure from formal equality for the purpose of favouring specified groups.

The benefits of 'compensatory discrimination' are extended to a wide array of groups. There are three major classes. First, there are those castes designated as Scheduled Castes on the basis of their 'untouchability'. They number nearly 80 million (14.6 per cent of population) according to the 1971 Census. Second, there are the

\* Reprinted from *Social and Economic Development in India: a Reassessment*, Dilip K. Basu and Richard Sisson, eds., New Delhi, Sage Publications India Pvt. Ltd. (1986).

Scheduled Tribes who are distinguished by their tribal culture and physical isolation and many of whom are residents of specially-protected Scheduled Areas. They number more than 38 million (6.9 per cent of the population in 1971). Third, there are the 'Backward Classes' (or, as they are sometimes called, 'Other Backward Classes'), a heterogeneous category, varying greatly from state to state, comprised for the most part of castes (and some non-Hindu communities) low in the traditional social hierarchy, but not as low as the Scheduled Castes. Also included among the Other Backward Classes are a few tribal and nomadic groups, as well as converts to non-Hindu religions from the Scheduled Castes and in some areas the Denotified Tribes. It has been estimated<sup>1</sup> that there were approximately 60 million persons under the Other Backward Classes heading in 1961 — roughly the magnitude of the Scheduled Caste population at that time (64 millions). (Today the portion of the population designated under this heading is probably larger).

For the most part, preferences have been extended on a communal basis. Members of specified communities are the beneficiaries of a given scheme and all members of the community, however, prosperous, are entitled to the benefits. However, some schemes use a means test to supplement the communal one — only members of the listed communities with incomes below the specified ceiling are eligible. In a few instances, the communal test has been replaced by an economic one — income or occupation or a combination of the two — and a few schemes use tests neither communal nor economic.

Preferences are of three basic types: first, there are reservations, which allot or facilitate access to valued positions or resources. The most important instances of this type are reserved seats in legislatures, reservation of posts in government service, and reservation of places in academic institutions (especially the coveted higher technical and professional colleges). To a lesser extent, the reservation device is also used in the distribution of land allotments, housing and other scarce resources. Second, there are programmes involving expenditure or provision of services — e.g., scholarships, grants, loans, land allotments, health care, legal aid — to a beneficiary group beyond comparable expenditure for others. Third, there are special protections. These distributive schemes are accompanied by efforts to protect the backward classes from being exploited and victimized. Forced labour is prohibited by the Constitution (Art. 23 (2) and in recent years there have been strenuous efforts to release the victims of debt bondage, who are mostly from Scheduled Castes and Tribes. Legislation regulating money lending, providing debt relief, and restricting land transfers attempt to protect Scheduled Castes

and Tribes from economic oppression by their more sophisticated neighbours. Anti-untouchability propaganda and the Protection of Civil Rights Act attempt to relieve Untouchables from the social disabilities under which they have suffered. This legislation is not 'compensatory discrimination' in the formal sense of departing from equal treatment to favour these groups; it enjoins equal treatment rather than confers preferential treatment. But in substance it is a special undertaking to remedy the disadvantaged position of the Untouchables.

### *The Array of (Alleged) Costs and Benefits*

Few in independent India have voiced disagreement with the position that the disadvantaged sections of the population deserve and need 'special help'. But there has been considerable disagreement about exactly who is deserving of such help, about the form this help ought to take, and about the efficacy and propriety of what the government has done under this head.

There is no open public defence of the *ancien regime*. Everyone is against untouchability and against caste. Public debate takes the form of argument among competing views of what is really good for the lowest castes and for the country. These views involve a host of assertions about the effects — beneficial and deleterious — of compensatory discrimination policies.

Here, I would like to sketch in the most general terms the full range of claims that are made as to benefits and costs — the various ways in which the policy of compensatory discrimination allegedly helps or hurts the protected groups, others and India as a whole.

Rough and redundant as it is, this anthology of claims will provide us with a checklist that will help in devising appropriate standards for evaluating specific schemes. For convenience each claimed benefit is paired with the opposite claim of cost. It would simplify matters if each of these pairs represented points on a single dimension that could be unambiguously measured. Unfortunately, the most that can be claimed for them is that each is a composite of sometimes reinforcing but occasionally conflicting qualities that may conveniently be grouped together. Since the lines between the claimed effects are not always distinct, some overlap and redundancy is unavoidable. It was necessary, for convenience in labelling, to devise some rubrics that are not found in ordinary talk of these matters, imparting a somewhat stilted quality to the list. These claims are listed here in an order that proceeds roughly from the most focussed and immediate to the most capacious and remote, from those which speak of impacts primarily on the beneficiaries

Alleged Benefits and Costs of  
Policy of Compensatory Discrimination

1. RE-DISTRIBUTION	vs.	DIVERSION
Preferences provide a direct flow of valuable resources to the beneficiaries in larger measure than they would otherwise enjoy.		These resources are enjoyed by a small segment of the intended beneficiaries and do not benefit the group as a whole.
2. REPRESENTATION	vs.	MISREPRESENTATION
Preferences provide for participation in decision-making by those who effectively represent the interests of the beneficiaries, interests that would otherwise be underrepresented or neglected.		By creating new interests which diverge from those of the beneficiaries, preferences obstruct accurate representation of their interests.
3. INTEGRATION	vs.	ALIENATION
By affording opportunities for participation and well being, preferences promote feelings of belonging and loyalty among the beneficiaries, thereby promoting the social and political integration of these groups into Indian society.		By emphasizing the separateness of these groups, preferences reduce their opportunities for (and feelings of) common participation.
4. ACCEPTANCE	vs.	REJECTION
Preferences induce in others an awareness that the beneficiary groups are participants in Indian life whose interests and views have to be taken into account and adjusted to.		Preferences frustrate others by what they consider unfair favoritism and educate them to regard the beneficiaries as separate elements who enjoy their own facilities and have no claim on general public facilities.

5. INTEGRITY	vs.	MANIPULATION
Preferences permit forms of action that promote pride, self-respect, sense of achievement and personal efficacy that enable the beneficiaries to contribute to national development as willing partners.		Preferences subject these groups to manipulation by others, aggravate their dependency, and undermine their sense of dignity, pride, self-sufficiency and personal efficacy.
6. INCUBATION	vs.	OVER-PROTECTION
By broadening opportunities, preferences stimulate the acquisition of skills and resources needed to compete successfully in open competition.		Preferences provide artificial protection which blunts the development of the skills and resources needed to succeed without them.
7. MOBILIZATION	vs.	ENERVATION
By cultivating talents, providing opportunities and incentives and promoting their awareness and self-consciousness, preferences enhance the capacity of the beneficiary groups to undertake organized collective action.		By making them dependent, blunting the development of talent, undermining self-respect, preferences lessen the capacity for organized effort on their own behalf.
8. STIMULATION	vs.	SEDATION
By increasing the visibility of the beneficiary groups, promoting their placement in strategic locations, and emphasizing the national commitment to remedy their condition, preferences serve as a stimulus and catalyst of enlarged efforts for their uplift and inclusion.		By projecting an image of comprehensive governmental protection and preferment, preferences stir the resentment of others, allaying their concern and undermining initiatives for measures on behalf of the beneficiary groups.

SELF-LIQUIDATION	or.	SELF-PERPETUATION
The benefits of preferential treatment are mutually reinforcing and will eventually render unnecessary any special treatment		These arrangements created vested interest in their continuation, while discouraging the development of skills, resources and attitudes that would enable the beneficiaries to prosper without special treatment.
10. FAIRNESS	or.	UNFAIRNESS
Preferences compensate for and help to offset the accumulated disabilities resulting from past deprivation of advantages and opportunities		Preferences place an unfair handicap on individuals who are deprived of opportunities they deserve on merit.
11. SECULARISM	or.	COMMUNALISM
By reducing tangible disparities among groups and directing attention to mundane rather than ritual standing, preferences promote the development of a secular society		By recognizing and stimulating group identity, preferences perpetuate invidious distinctions, thereby undermining secularism.
12. DEVELOPMENT	or.	STAGNATION
Preferences contribute to national development by providing incentives opportunities and resources to utilize neglected talent.		Preferences impede development by misallocation of resources, lowering of morale and incentive, and waste of talent.

This catalogue is clearly not a set of explanations of why these policies were adopted, although such goals undoubtedly played a part. It is a set of standards for judging these policies. But whose standards? Obviously they are the author's, but I would claim that they are more than the author's—a claim supported by their provenance, for they are refinements and generalizations of arguments found in current Indian discourse about these policies. I would claim further that the list encompasses most of the standards that would occur to a disinterested policy-maker. (By this I mean a policy-maker concerned with these policies *per se* rather than with their implications for his political fortunes.) In this accounting of costs and benefits I have put to one side those benefits (and costs) that accrue to individual actors from supporting or opposing a particular programme (apart from some that enter incidentally under the heading of diversion). This is not because I suppose that policy makers omit consideration of the personal and political gains and losses that such positions entail. The course that policy takes is very much shaped by this second level of costs and benefits. But although any given actor may have his own schedule of priorities and his own admixture of second-level objectives, almost all would share at least some part of the goals implied by these standards. And virtually all would appeal for support in terms of these standards. That actors differ in their priorities and goals as well as in their estimates of fact does not reduce the usefulness of exposing and articulating standards for judging these policies.

The evaluation of these compensatory programmes involves a two stage inquiry. First there is what we might call the problem of performance: does the programme actually deliver the goods (more jobs or housing or better performance in schools or whatever)? In making such judgments we must be wary of all the pitfalls of measuring programme effects. Having satisfied ourselves that the programme has the projected effect, we then face what we might call the problem of achievement. Has the programme produced the results that it is supposed to achieve—do more jobs for Scheduled Castes produce considerate treatment by officials, or stimulate educational accomplishment, or produce social integration? To what extent does delivering the jobs entail the costs alleged by critics of preferential treatment—stigmatizing the beneficiaries, fomenting group resentments, lowering self-esteem, etc?

This is not a list of the direct effects of compensatory programmes—e.g. more jobs, higher literacy or better nutrition. It is a list of the good and bad effects that are alleged to flow from the performance promised by the programme including the effects attributable to the specifically preferential aspects of the programme. Even if all of these dimensions enter into estimation of the overall working of the

compensatory discrimination policy, it is not implied that all of them are involved in every specific scheme. Nor is it implied that they are to be accorded equal weight in making such evaluations. Presumably specific schemes in different fields (education, housing, etc.) or for different groups (Scheduled Castes, Scheduled Tribes, Other Backward classes) have a different mix of intended effects. And, the relative weights to be assigned to those effects (and to unintended by-products) will differ among various participants and observers.

### *A Costly Success*

Have these policies 'worked'? What results have they produced? And at what costs? Our tabulation of alleged costs and benefits suggests the complexity hidden in these apparently simple questions. Performance is difficult to measure: effects ramify in complex interaction with other factors. Compensatory policies are designed to pursue a multiplicity of incommensurable goals in unspecified mixtures that vary from programme to programme, from time to time, and from proponent to proponent. Evaluation of a specific scheme for a specific group during a specific period is itself a daunting undertaking. In other places, I have attempted to use this checklist of claims in evaluating specific schemes.<sup>2</sup>

What I want to do here is draw a crude sketch of the effects of the compensatory discrimination policy in their largest outline. What has the commitment to compensatory discrimination done to the shape of Indian society and of lives lived within it?

The limited clarity of such a sketch is dimmed by the necessity of distinguishing between compensatory discrimination for the Scheduled Castes and Tribes on the one hand for the Other Backward Classes on the other. The following summary focuses on programmes for Scheduled Castes and Tribes and adds some qualifications in the light of experience with schemes for the Other Backward Classes.

Undeniably compensatory discrimination policies have produced substantial redistributive effects. Reserved seats provide a substantial legislative presence and swell the flow of patronage, attention and favourable policy to Scheduled Castes and Scheduled Tribes. The reservation of jobs has given to a sizable portion of the beneficiary groups earnings, and the security, information, patronage and prestige that goes with government employment. At the cost of enormous wastage, there has been a major redistribution of educational opportunities to these groups. (Of course not all of this redistribution can be credited to preferential policies, for some fraction would presumably have occurred without them.)

<sup>2</sup> Galanter (1979); Galanter (1984).

Such redistribution is not spread evenly throughout the beneficiary group. There is evidence for substantial clustering in the utilization of these opportunities. The clustering appears to reflect structural factors (e.g., the greater urbanization of some groups) more than deliberate group aggrandizement, as often charged.<sup>3</sup> The better situated among the beneficiaries enjoy a disproportionate share of programme benefits.<sup>4</sup> This tendency, inherent in all government programmes—quite independently of compensatory discrimination—is aggravated here by passive administration and by the concentration on higher echelon benefits. Where the list of beneficiaries spans groups of very disparate condition—as with the most expansive lists of other Backward Classes—the 'creaming' effect is probably even more pronounced.

The vast majority are not directly benefitted, but reserved jobs bring a manyfold increase in the number of families liberated from circumscribing subservient roles, able to utilize expanding opportunities and support high educational attainments. Although such families comprise only a tiny fraction—an optimistic guess might be 6 per cent<sup>5</sup>—of all Scheduled Caste families, they provide the crucial leaven from which effective leadership might emerge.

Reserved seats afford a measure of representation in legislative settings, though the use of joint electorates deliberately muffles the assertiveness and single-mindedness of that representation. The presence of SC and ST in legislative settings locks in place the other programmes for their benefit and assures that their concerns are not dismissed or ignored. Job reservations promote their presence in other influential roles and educational preferences provide the basis for such participation. Of course these positions are used to promote narrower interests—although we should not assume automatically that those they displace would bestow the benefits of their influence more broadly. If, for example, reserved seat legislators are dispro-

<sup>3</sup> Shah and Patel (1977:149ff).

<sup>4</sup> Malik (1979: 158).

<sup>5</sup> Isaacs (1965:111) estimates that perhaps as many as ten per cent of the Scheduled Caste population is 'coming up,' largely through reserved posts. Our figures suggest that his estimate is probably on the high side. By 1975, just about 180,000 Scheduled Castes were in Class III or higher service with the Central government. Let us assume (generously) about an equal number of Class III or higher in public sector enterprises and the same number in state services. That gives us about 500,000. If we make the very optimistic assumption that for every such person, there is another person similarly situated in local government, public sector, or private sector employment, we come to a total of 1,000,000. If we assume that each of these persons is the head of a family of five, we come to a total of five million persons in such mobile families—just over 6 per cent of the entire Scheduled Caste population. If we were willing to include Class IV employment as having similar potential for mobility, we would more than double our figures and come out with something close to ten million.

portionately attentive to the concerns of those of their fellows who already have something, it is not clear that this is more the case with them than with legislators in general seats.

Legislative seats are occupied by members of national political parties. They must aggregate broad multi-group support in order to get elected and, once elected, must participate in multi-group coalitions in order to be effective. In the office setting, too, there are relations of reciprocity and interdependence. The broad participation afforded by reserved seats and reserved jobs is for many others a source of pride and warrant of security.

If the separate and special treatment entailed by preferential programmes wounds and alienates the members of beneficiary groups, this is amplified by the hostility experienced on being identified as a recipient. As sources of alienation, these experiences must be placed against the background of more devastating manifestations of hostility, such as the much publicized assaults and atrocities perpetrated on Scheduled Castes.

At the policy-making level, reserved seats have secured acceptance of Scheduled Castes and Tribes as groups whose interests and views must be taken into account. In every legislative setting they are present in sufficient numbers so that issues affecting these groups remain on the agenda. Anything less than respectful attention to their problems, even if only lip service, is virtually unknown. Overt hostility to these groups is taboo in legislative and many other public forums. But there is evidence that Scheduled Castes and Tribes are not accepted politically. Very few members of these groups are nominated for non-reserved seats and only a tiny number are elected. There is massive withdrawal by voters from participation in election for reserved seats in the legislative assemblies. Apparently large numbers of people do not feel represented by these legislators and do not care to participate in choosing them.<sup>6</sup>

In the long term, education and jobs help weaken the stigmatizing association of Scheduled Castes and Tribes with ignorance and incompetence, but in the short run they experience rejection in the offices, hostels and other settings into which they are introduced by preferential treatment.<sup>7</sup> Resentment of preferences may magnify hostility to these groups, but rejection of them obviously exists independently of compensatory programmes.

Compensatory programmes provide the basis for personal achievement and enlarge the beneficiaries' capacity to shape their own lives. But in other ways the programmes curtail their autonomy.

<sup>6</sup> The evidence is presented in Galanter (1979).

<sup>7</sup> Cf. Malik's (1979:50) finding that middle-class Scheduled Castes experience more exclusion than do their less educated fellows.

The design of the legislative reservations, the dependence on outside parties for funds and organizations and the need to appeal to constituencies made up overwhelmingly of others — tends to produce compliant and accommodating leaders rather than forceful articulators of the interests of these groups. The promise of good positions offers a powerful incentive for individual effort. But reservations in government service — and educational programmes designed to provide the requisite qualifications — deflect the most able to paths of individual mobility that remove them from leadership roles in the community. Constraints are intruded into central issues of personal identity by eligibility requirements that penalize those who would solve the problem of degraded identity by conversion to a non-Hindu religion.

Although preferential treatment has kept the beneficiary groups and their problems visible to the educated public, it has not stimulated widespread concern to provide for their inclusion apart from what is mandated by government policy. (This lack of concern is manifest in the record of private sector employment — as it was in public undertaking employment before the introduction of reservations.) Against a long history of such lack of concern, it is difficult to attribute its current absence to compensatory discrimination policy. But this policy has encouraged a tendency to absolve others of any responsibility for the betterment of Scheduled Caste and Scheduled Tribe on the ground that it is a responsibility of the government.<sup>8</sup> The pervasive overestimation of the amount and effectiveness of preferential treatment reinforces the notion that enough (or too much) is already being done and, nothing more is called for.

Compensatory preference involves a delicate combination of self-liquidating and self-perpetuating features. Reservations of upper-echelon positions should become redundant as preferential treatment at earlier stages enables more beneficiaries to compete successfully, thus decreasing the net effect of the reservations. A similar reduction of net effect is produced by the extension to others of benefits previously enjoyed on a preferential basis (e.g., free schooling). Judicial requirements of more refined and relevant selection of beneficiaries (and of periodic reassessment) and growing use of income cut-offs provide opportunities to restrict the number of beneficiaries.

Reserved seats in legislatures are self-perpetuating in the literal sense that their holders can help to produce their extension, but

<sup>8</sup> Cf. Dushkin's observation (1979:666) that 'In the course of my visits to India over two decades I have noticed an erosion and virtual disappearance of a liberal-minded public opinion supporting private efforts to improve opportunities for Scheduled Castes.'

extension requires support from others. The periodic necessity of renewal provides an occasion for assessment and curtailment. Programmes for Scheduled Castes and Scheduled Tribes are for a delimited minority and pose no danger that the compensatory principle will expand into a comprehensive and self-perpetuating system of communal quotas. Although restrained by the courts, the provisions for the Other Backward Classes are open-ended: a majority may be the beneficiaries and the dangers of self-perpetuation cannot be dismissed.

The diversion of resources by compensatory discrimination programmes entails costs in the failure to develop and utilize other talents. The exact extent of this is unclear. It seems mistaken, for example, to consider compensatory discrimination a major factor in the lowering of standards that has accompanied the vast expansion of educational facilities since independence. The pattern in education has been less one of excluding others than of diluting educational services while extending them nominally to all. Similarly the effect of Scheduled Castes and Tribes on the effectiveness of a much enlarged government bureaucracy is overshadowed by a general lowering of standards combined with the assumption of a wide array of new and more complex tasks.

The most disturbing costs of preferential programmes may flow not from their exclusion of others but from their impact on the beneficiaries. What do the programmes do to the morale and initiative of those they purport to help? The numbers who fall by the educational wayside are legion. How rewarding is the educational experience of those who survive? Compensatory discrimination policies are not the source of the deficiencies of Indian education which impinge with special force on the beneficiaries.

As a forced draft programme of inclusion of Scheduled Castes and Scheduled Tribes within national life, compensatory discrimination has been a partial and costly success. Although few direct benefits have reached the vast mass of landless labourers in the villages, it has undeniably succeeded in accelerating the growth of a middle class within these groups—urban, educated, largely in government service. Members of these groups have been brought into central roles in the society to an extent unimaginable a few decades ago. There has been a significant redistribution of educational and employment opportunities to them; there is a sizable section of these groups who can utilize these opportunities and confer advantages on their children; their concerns are firmly placed on the political agenda and cannot readily be dislodged. But if compensatory discrimination can be credited with producing this self-sustaining dynamic of inclusion, there is at the same time a lesser counter-dynamic of resentment, rejection, manipulation and low self-esteem.

And these gains are an island of hope in a vast sea of neglect and oppression. This mixed pattern of inclusion and rejection, characteristic of urban India and of the 'organized' sector, is echoed in the villages by a pattern of increasing assertion and increasing repression.

Since independence India has undergone what might crudely be summarized as development at the upper end and stagnation at the bottom. With the boost given by compensatory discrimination a section of the Scheduled Castes and Scheduled Tribes has secured entry into the 'modern' class manning the organized sector. What does this portend for the bulk of untouchables and tribals who remain excluded and oppressed? Are they better or worse off by virtue of the fact that some members of their descent groups have a share in the benefits of modern India? The meaning of these achievements ultimately depends on how one visualizes the emergent Indian society and the role of descent groups in it.

Even this kind of crude characterization of the overall impact of policies is not possible in dealing with measures for Other Backward Classes. Policies diverge from state to state, and very different groups of people are involved. In some states the Other Backward Classes category is used to address the problems of a stratum of lowly groups who are roughly comparable in circumstance to the Scheduled Castes and Tribes. In other places this category has been used to tilt the distribution of government benefits in favour of a major section of the politically dominant middle castes. The latter doubtless produce substantial redistributive effects, if less in the way of including the most deprived. But these expensive preferences for Other Backward Classes are of immense consequence for the Scheduled Castes and Tribes. They borrow legitimacy from the national commitment to ameliorate the condition of the lowest. At the same time they undermine that commitment by broadcasting a picture of unrestrained preference for those who are not distinctly worse off than non-beneficiaries, which attaches indiscriminately to all preferential treatment. And because the Other Backward Class categories are less bounded and are determined at the state rather than at the Centre, they carry the threat of expanding into a general regime of communal allotments.

### *Fairness and History*

Arguments about the utility of compensatory preference entwine with arguments about its fairness. Apart from the other costs, is compensatory preference so tainted by unfairness that it is illegitimate to promote the general welfare by this means? We have encountered several arguments about the fairness and unfairness

of these programmes. We shall examine four here: (1) is it unfair to depart from judgments on 'individual merit' to favour the beneficiaries over contenders for valued resources? (2) Is it unfair to compensate members of some groups for injustice perpetrated on their ancestors? (3) Is it unfair to compensate some victims and not others? (4) Is it unfair that some should bear more of the burden of compensation than others? Before taking up these fairness arguments it may be helpful to recall the justifications that may be advanced for the compensatory discrimination policy. Although they are often entwined in practice, we can separate out three sorts of justifications for these measures, which I label the non-discrimination, the general welfare and the reparations themes.

#### *The Non-discriminatory Theme*

Compensatory discrimination may be viewed as an extension of the norms of equal treatment, an extension invited by our awareness that even when invidious discriminatory standards are abandoned there remain subtle and tenacious forms of discrimination and structural factors which limit the application of new norms of equality. Aspiring members of previously victimized groups encounter biased expectations, misperceptions of their performance, and cultural bias in selection devices; they suffer from the absence of informal networks to guide them to opportunities; entrenched systems of seniority crystallize and perpetuate the results of earlier discriminatory selections. Thus norms of non-discrimination in present distributions are insufficient to erase or dislodge the cumulative effects of past discrimination. Compensatory preference operates to counter the residues of discrimination and to overcome structural arrangements which perpetuate the effects of past selections in which invidious discrimination was a major determinant. In this view compensatory preference serves to assure personal fairness to each individual applicant. Group membership is taken into account to identify those individuals who require special protection in order to vindicate their claim for selection on 'merit' grounds. (The justification for much American affirmative action is often cast in these terms—as an extension of classical individualistic non-discrimination principles.)

#### *The General Welfare Theme*

On the other hand, compensatory discrimination may be advocated not as a device to assure fairness to individuals, but as a means to produce desired social outcomes—e.g. to reduce group disparities, afford representation, encourage the development of talent and so forth. Arrangements for reservations in British India were justified on such 'functional' grounds as are the various preferences for

'Oriental' Jews in Israel today.<sup>9</sup> Americans are familiar with the 'balanced ticket' and other arrangements by which shares are apportioned among various constituencies in the exception that abrasive disparities are kept in bounds, participation is spread out, representation is secured and responsiveness assured. The units in such functional 'welfare' calculations are groups rather than individuals. The chances of individuals are affected by the rearrangement of the chances of groups. But the purpose is not to rectify discriminatory selection among individuals, but to introduce a standard quite apart from personal desert.

The contrast of non-discrimination and welfare themes is displayed in imaginary alternative proposals for admitting more members of Group X to medical colleges. The non-discrimination proposal might argue that selection procedures be revised to eliminate subtle bias which impinged on individual Xs—e.g., culturally biased tests or differences in networks for acquiring recommendations. The general welfare proposal might argue that more Xs should be admitted in order to equalize distribution of medical services or for the representation of X views in making health policy or to afford non-X doctors the experience of fellowship with Xs. The goal is not a non-discriminatory selection of Xs among individual applicants, but a selection that optimises social goals. Such a selection might diverge from that which would be dictated merely by the prospects of individual performance on the job, because it defines the job to include the symbolic, representational and educational aspects that may not be included in the job description.

#### *The Reparations Theme*

In some cases, compensatory policies have another root—that a history of invidious treatment has resulted in accumulated disabilities which are carried by certain groups. No matter how fair and unbiased the measures presently employed for distributing benefits, the victims of past injustice will not fare well in terms of current performance. To distribute benefits by neutral standards will perpetuate and amplify unjust exactions and exclusions in the past. Fairness then demands that present distributions be arranged to undo and offset old biases, not to perpetuate them.<sup>10</sup>

<sup>9</sup> On these programmes, see Smootha (1978); Adler, *et. al* (1975).  
<sup>10</sup> The notion of restitution for collective misdeeds is familiar in the indemnity and reparation payments exacted from defeated nations. See Angell (1934). Something closer to the compensatory discrimination situation is found in the reparations payments paid by Germany to Israel as the representative of Jews victimized by the Nazis. See Grossman (1954). In these instances the lapse of time between

Like the non-discrimination theme, this is a fairness argument rather than a welfare argument. But it emphasizes groups as the carriers of historic rights rather than as indicators of individual victimization. And it looks to a very different time frame. Welfare arguments are prospective; non-discrimination looks at the present situation and seeks to refine out lingering inequalities. The reparations theme sees the present as an occasion to reckon accounts for past injustice.

Do preferential programmes unfairly confer benefits on grounds that depart from evenhandedness, merit, etc. that should govern the distribution of opportunities and resources? Along the lines referred to above as the 'non-discrimination' theme, proponents might respond that some of the preference accorded is not departure from evenhandedness but its extension in substance rather than form to individual members from the beneficiary groups. In this view, compensatory discrimination arrangements counter subtle discriminations and overcome the structural arrangements which entrench the results of past selections from which the beneficiaries were excluded.

In the Indian setting, few would argue that compensatory discrimination seeks only to protect merit against subtle or structural bias. Preferential treatment is accepted as a departure from merit selection in order to promote such goals as redistribution, integration and representation. Is it unfair to combine these with merit as a basis for distributing benefits?

Let us take merit to mean performance on tests (examinations, interviews, character references, or whatever) thought to be related to performance relevant to the position (or other opportunity) in question and commonly used as a measure of qualification for that position. (In every case it is an empirical question whether the test performance is actually a very good predictor of performance in the position, much less of subsequent positions for which it is a preparation.) Performance on these tests is presumably a composite of native ability, situational advantages (stimulation in the family setting, good schools, sufficient wealth to avoid malnutrition or exhausting work, etc.) and individual effort. The latter may be regarded as evidence of moral desert, but neither native ability nor situational advantages would seem to be. The common forms of selection by merit do not purport to measure the moral desert dimension of performance. Unless one is willing to assure that such virtue

of 'back pay' raised in the American setting. Lecky and Wright (1969); Schuchter (1970); Bitker (1973). But a scheme of preferences may lack this theme of justification entirely, as in the Israeli case (note 9 above) where the privileged and deprived groups had little previous contact.

is directly proportionate to the total performance, the argument for merit selection cannot rest on the moral deservingness of individual candidates. Instead it rests upon the supposed consequences: those with more merit will be more efficient or productive; awarding them society's scarce resources will produce more indirect benefits for their fellows. A regime of rewarding merit will maximize incentive to cultivate talents; the demoralizing effects of departing from merit outweigh supposed advantages, based on calculations of imponderables. The argument for merit is an argument for production of more social well-being.

Many sorts of effects flow from any allocation of resources: benefits are multiple, they include not only tangible production, but symbolic affirmations and the creation of competences. The allocation of education, government jobs or medical careers arguably has consequences for the distribution of incentives, levels of participation, disparities in the delivery of services. Which dimensions of benefit are to be taken into account in designing a given selection? In settings where there has been a broad consensus that a single-minded test of performance is appropriate, what is the argument for a shifting to a broader, promotional basis of selection? Compensatory discrimination schemes involve enlargement of the basis of selection to include other criteria along with the productivity presumably measured by 'merit'—representation, integration, stimulation, and so forth. This enlargement is justified on the ground that without it society would be deprived of the various benefits thought to flow from the enhanced participation of specified groups in key sectors of social life. The argument is that the combination maximizes the production of good results. Of course there is always the empirical question of whether the promised results are indeed produced, but the supplementation of merit with other instrumental bases of selection hardly seems unfair in principle. Pursuit of other worthy results can be balanced against merit, as one result-oriented justification for unequal allocations against another.

Compensatory discrimination is both more and less than a reformulation of selection criteria. It is less because typically merit (in narrow performance terms) is left intact for the main part of the selection. The criteria are modified to require the inclusion of certain groups, an inclusion thought to produce a wide spectrum of beneficial results. But the new mixed standards are not applied across the board to the whole selection. So compensatory discrimination involves something more: the demarcation of those groups in whose behalf the broader promotional standards should be employed.

To prefer one individual over another on grounds of caste, religion (or other ascriptive criteria) is specifically branded as unfair by the anti-discrimination provisions of the Indian Constitution. The ban

on the use of these criteria is, as we have seen, qualified to allow preferential treatment of a certain range of groups, whose history and condition seemed distinctive. There was agreement that some groups were burdened by a heritage of invidious discrimination and exclusion (and/or isolation) that made their condition distinct from that of their fellow citizens; the deprivations of their past and present members were thought to justify a special effort for their improvement and inclusion.

Spokesmen for backward classes sometimes call for measures specifically to remedy the wrongs of the past. If one thinks of the blighted lives, the thwarted hopes, the dwarfing of the human spirit inflicted on generations of untouchables, or of the oppression and exploitation of tribal peoples, the argument for measured vindication of these historic wrongs has an initial appeal. But there are many kinds and grades of victimization; deprivations are incommensurable. Perpetrators and victims sometimes stand out in stark clarity, but infirm and incomplete data often leave unclear precisely who were brutally exploitative, who willing or reluctant collaborators, who inadvertent beneficiaries of what we now see as systems of oppression. These arrangements interact with many other factors — climate, invasions, technology — in their influence on the present distribution of advantages and disadvantages. The web of responsibility is tangled and as we try to trace it across generations, only the boldest outlines are visible. Without minimizing its horrors, the past provides a shaky and indistinct guide for policy. It is beyond the capacity of present policy to remedy these wrongs: in the literal sense these injustices remain irremediable.

But if our perception of past injustice does not provide a usable map for distributing reparative entitlements, it can inform our vision of the present, sensitizing us to the traces and ramifications of historic wrongs. The current scene includes groups which are closely linked to past victims and which seem to suffer today from the accumulated results of that victimization. In a world in which only some needs can be met, the inevitable assignment of priorities may take some guidance from our sense of past injustice — thus providing the basis for a metaphoric restitution.

All remedies involve new distinctions and thus bring in their train new (and it is hoped lesser) forms of unfairness. Singling out these historically deprived groups for remedial attention introduces a distinction among all of the undeserved inflections and unfairnesses of the world. One batch of troubles, but not others, are picked out for comprehensive remedy using extraordinary means. Those afflicted by other handicaps and misfortunes are left to the succor and aid that future policy-makers find feasible and appropriate within the framework of competing commitments (including commitments

to equal treatment). But drastic and otherwise outlawed remedies were authorized for victims of what was seen as a fundamental flaw in the social structure. The special quality of the commitment to correct this flaw is dramatized by the Constitution's simultaneous rejection of group criteria for any other purpose.

The line of distinct history and condition that justifies compensatory discrimination is of course less sharp in practice than in theory. There are borderlines, grey areas, gradual transitions. There is disagreement about just where the line should be drawn. And once it is drawn, the categories established are rough and imperfect — summations of need and desert; there are inevitable 'errors' of under-inclusion and over-inclusion.

We arrive then at an ironic tension that lies at the heart of the compensatory discrimination policy. Since the conditions that invite compensatory treatment are matters of degree, special treatment generates plausible claims to extend coverage to more groups. The range of variation among beneficiaries invites gradation to make benefits proportionate to need. Those preferential policies create new discontinuities and it is inviting to smooth them out by a continuous modulated system of preferences articulated to the entire range of need and/or desert. But to do so is to establish a general system of group allotments.

Compensatory discrimination replaces the arbitrariness of formal equality with the arbitrariness of a line between formal equality and compensatory treatment. The principles that justify the preference policy counsel flexibility and modulation. We may shave away the arbitrary features of the policy in many ways. But we may dissolve the arbitrary line separating formal equality and preferential treatment only at the risk of abandoning the preference policy for something very different.

If there is to be preferential treatment for a distinct set of historically victimized groups, who is to bear the cost? Whose resources and life-chances should be diminished to increase those of the beneficiaries of this policy? In some cases, the costs are spread widely among the taxpayers, for example, or among consumers of a 'diluted' public service. But in some cases major costs impinge on specific individuals like the applicant who is bumped to fill a reservation. Differences in public acceptance may reflect this distinction. Indians have been broadly supportive of preferential programmes — e.g. the granting of educational facilities and sharing of political power — where the 'cost' of inclusion is diffused broadly. Resentment has been focussed on settings where the life chances of specific others are diminished in a palpable way, as in reservations of jobs and medical college places.

There is no reason to suppose that those who are bumped from

valued opportunities are more responsible for past invidious deprivations than are those whose well-being is undisturbed. Nor that they were disproportionately benefitted by invidious discrimination in the past. Reserved seats or posts may thus be seen as the conscription of an arbitrarily selected group of citizens to discharge an obligation from which equally culpable debtors are excused. The incidence of reservations and the effectiveness with which they are implemented tends to vary from one setting to another. Reservations impinge heavily on some careers and leave others virtually untouched. The administration of compensatory discrimination measures seems to involve considerable unfairness of this kind. If some concentration of benefits is required by the aims of the preference policy,<sup>11</sup> it seems clear that more could be done to distribute the burden among non-beneficiaries more widely and more evenly.

### *Secularism and Continuity*

Fairness apart, to many Indian intellectuals compensatory discrimination policies seem to undermine progress toward the crucial national goal of a secular society. Secularism in this setting implies more than the separation of religion and state (religious freedom, the autonomy of religious groups, withdrawal of state sanction for religious norms, and so forth). It refers to the elimination (or minimization) of caste and religious groups as categories of public policy and as actors in public life.<sup>12</sup> In this 1950s and 1960s this was frequently expressed as pursuit of a 'casteless' society. Proponents of such a transformation were not always clear whether they meant the disestablishment of social hierarchy or the actual dissolution of caste units. But at the minimum what was referred to was a severe reduction in the salience of caste in all spheres of life.

The Constitution envisages a new order as to the place of caste in Indian life. There is a clear commitment to eliminate inequality of status and invidious treatment and to have a society in which government takes minimal account of ascriptive ties. But beyond this the posture of the legal system toward caste is not as single-minded as the notion of a casteless society might imply. If the law discourages some assertions of caste precedence and caste solidarity, in other respects the prerogatives previously enjoyed by the caste

<sup>11</sup> Cost spreading may itself entail costs in terms of the benefits delivered to the beneficiaries. For example, rotation of reserved legislative seats among constituencies might cure unfair clustering of costs, but it would vitiate the value of the reserved seats, rendering impossible the accumulation of experience, seniority and political strength.

<sup>12</sup> On the aspiration to secularism, see the literature cited in Galanter (1984: chap. 9, note 85).

group remain unimpaired. The law befriends castes by giving recognition and protection to the new social forms through which caste concerns can be expressed (caste associations, educational societies, political parties, religious sects).<sup>13</sup>

If the legal order's posture toward caste is ambivalent, public denunciation of caste has universal appeal. For lower castes it provides an opportunity to attack claims of superiority by those above them; for the highest castes it is a way to deplore the increasing influence of previously subordinate groups, either the populous middle castes that have risen to power with adult suffrage or the lowest castes whose inclusion is mandated by compensatory discrimination programmes. Looking up, the call for castelessness is an attack on the advantages retained by those who rank high in traditional terms; looking down, it denies legitimacy to the distributive claims of inferiors and insists on evenhanded application of individual merit standards.

The use of caste groups to identify the beneficiaries of compensatory discrimination has been blamed for perpetuation of the caste system, accentuating caste consciousness, injecting caste into politics and generally impeding the development of a secular society in which communal affiliation is ignored in public life.<sup>14</sup> This indictment should be regarded with some scepticism. Caste ties and caste-based political mobilization are not exclusive to the backward classes. The political life within these groups is not necessarily more intensely communal in orientation.<sup>15</sup> nor are the caste politics of greatest political impact found among these groups. Communal considerations are not confined to settings which are subject to compensatory discrimination policies but flourish even where they are eschewed. Although it has to some extent legitimated and encouraged caste politics, it is not clear that the use of caste to designate beneficiaries has played a preponderant role in the marriage of caste and politics. Surely it is greatly overshadowed by the franchise itself, with its invitation to mobilize support by appeal to existing loyalties. But the avowed and official recognition of caste in compensatory discrimination policy combines with the overestimation of its effects to provide a convenient target for those offended and dismayed by the continuing salience of caste in Indian life.

<sup>13</sup> See chap. 7.

<sup>14</sup> See Galanter (1984: chap. 4, D).

<sup>15</sup> Consider, for example, the fascinating finding of Eldermeld and Ahmed (1975: 205), studying political participation, that 'the overwhelming majority of... activists are politically conscious of caste. They know how the caste leader voted. Among upper castes the ratio is 6 to 1 that activists are aware of caste, in the middle castes it is better than 8 to 1, and for the lower castes and Harijans it is 3 to 1 that activists are caste conscious.'

The amount of preference afforded to the Scheduled Castes and Tribes is widely overestimated. The widespread perception of uniqueness and unrestrained preferment for these groups derives from several sources. First, there is the chronic overstatement of the effects of reservation: large portions of reservations (especially for cherished higher positions) are not filled; of those that are filled, some would have been gained on merit; diversion of benefits to a few may be perceived as a deprivation by a much larger number. The net effect is often considerably less than popularly perceived. Second, ambiguous nomenclature and public inattention combine to blur the distinction between measures for Scheduled Castes and Tribes and those for Other Backward Classes. The resentment and dismay engendered by use of the Other Backward Classes category to stake out massive claims on behalf of peasant-middle groups (particularly in some southern states) are readily transferred to discredit the more modest measures for Scheduled Castes and Tribes.

If caste has displayed unforeseen durability it has not remained unchanged. Relations between castes are increasingly independent and competitive, less interdependent and co-operative. 'Horizontal' solidarity and organization within caste groups have grown at the expense of 'vertical' integration among the castes of a region. The concerns of the local endogamous units are transformed as they are linked in wider networks and expressed through other forms of organization—caste associations, educational societies, unions, political parties, religious societies.

If secularism is defined in terms of the elimination of India's compartmental group structure in favour of a compact and unitary society, then the compensatory discrimination policy may indeed have impeded secularism. But one may instead visualize not the disappearance of communal groups but their transformation into components of a pluralistic society in which invidious hierarchy is discarded while diversity is accommodated. In this view compensatory discrimination policy contributes to secularism by reducing group disparities and blunting hierarchic distinctions.

The development of a secular society in which the hierarchic ordering of groups is not recognized and confirmed in the public realm is a departure from older Indian patterns. The compensatory discrimination policy is a major component in the disestablishment of a central part of the traditional way of ordering the society. But this break with the past, itself is conducted in a familiar cultural and institutional style. The administration of preference programmes reflects older patterns in the fecund proliferation of overlapping schemes, the fragmentation of responsibility and the broad decentralization of authority under the aegis of unifying symbols. When these

hierarchy establishing fixed doctrine turns out to be a loose collegium presiding over an open textured body of learning within which conflicting tendencies can be accommodated and elaborated.

The compensatory principle of substantive equality is added to the constitutional scheme of formal equality but it does not displace it. This juxtaposition of conflicting principles is an instance of what Glanville Austin admirably describes as one of

India's original contributions to constitution-making [that is] accommodation... the ability to reconcile, to harmonize, and to make work without changing their content, apparently incompatible concepts—at least concepts that appear conflicting to the non-Indian, and especially to the European or American observer. Indians can accommodate such apparently conflicting principles by seeing them at different levels of value, or, if you will, in compartments not watertight, but sufficiently separate so that a concept can operate freely within its own sphere and not conflict with another operating in a separate sphere....

With accommodation, concepts and viewpoints, although seemingly incompatible, stand intact. They are not whittled away by compromise but are worked simultaneously.<sup>16</sup>

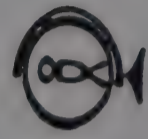
The expectation that these principles could co-exist has been fulfilled. The compensatory principle has been implemented but it has not been allowed to overshadow or swallow up opposing commitments to merit and to formal equality.

The compensatory discrimination policy is not to be judged only for its instrumental qualities. It is also expressive: through it Indians tell themselves what kind of people they are and what kind of nation. These policies express a sense of connection and shared destiny. The groups that occupy the stage today are the repositories and transmitters of older patterns. Advantaged and disadvantaged are indissolubly bound to one another. There is a continuity between past and future that allows past injustices to be rectified. Independence and nationhood are an epochal event in Indian civilization which make possible a controlled transformation of central social and cultural arrangements. Compensatory discrimination embodies the brave hopes of India reborn that animated the freedom movement and was crystallized in the Constitution. If the reality has disappointed many fond hopes, the turn away from the older hierarchic model to a pluralistic participatory society has proved vigorous and enduring.

# The Idea of Justice

by

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- (1) Justice and injustice are dependent on positive law.  
Where there is no law there is no justice.  
Justice depends on society and varies according to the constitution of the society.
- (2) Law itself is independent of justice.  
Law is not just or unjust.  
The pursuit of justice is not the purpose of law.  
No state as such is just or unjust.
- (3) Justice consists in conformity to the positive law.  
Justice is not adequately defined as rendering to each his due.  
Justice is not based on natural right.
- (4) Justice apart from legality is merely a subjective norm.  
Justice implies approbation as well as legality.  
The approbation of justice, apart from legality, is subjective.
- (5) Justice is obligatory ultimately only because of legal sanctions.  
The sanction of law and hence of justice rests on agreement and might.  
Justice imposes no distinct kind of moral duty.
- (6) The virtue of justice is identical with obedience.

## The Social Good Theory of Justice

The following six propositions serve to identify the Social Good theory of justice:

- (1) Justice and injustice are not exclusively dependent on positive law.
- (2) Justice provides a criterion for the goodness of a law.
- (3) Justice derives exclusively from society and consists ultimately in promoting the social good.
- (4) Justice is an objective norm for human actions.
- (5) Justice imposes a moral duty based on the social good and is not primarily dependent on legal sanctions.
- (6) Justice is a distinct virtue, disposing one to act for the social good, and is similar to benevolence.

Each of the six propositions asserts a definite position regarding the corresponding fundamental issue. On some of the issues the position asserted is the same as that taken by the Natural Right theory and is opposed to that taken by the Positive Law theory of justice. Yet there is no assertion of natural right as such, and, in the exposition of the third proposition, we shall see that it is explicitly denied that natural

right provides the basis of justice. In fact, the explicit reference to the social good in the third, fifth, and sixth propositions serves to distinguish this theory from the Natural Right theory of justice.

In addition to its denial of natural right, the theory shares still another feature with the Positive Law theory. It takes the same position on the relation between justice and society. All theories agree that justice is a social norm and applies only to men in their social relations. But unlike the Natural Right theory, and in opposition to it, these two theories hold further that society is the sole source of justice and arises only from the agreements men make in order to promote their social life. It denies that justice has a natural basis and thus, in effect, holds that it is basically a conventional relation. While at first sight it may appear that the Social Good theory sharply opposes the Positive Law theory on each of the six fundamental issues, this is actually not the case. On the third issue, regarding natural right and the relation of justice to society, the two theories agree in affirming the conventional basis of justice.

On the other issues, however, the theory departs from the Positive Law theory and agrees with the Natural Right theory. It refuses to limit justice to questions of positive law (1), allows expressly that justice is a criterion of law (2), that it is an objective norm (4), that it has its own special moral sanction attaching to its dictates (5), and that it is a distinct virtue (6).

Even if the theory did no more than combine certain assertions of the Positive Law theory with other assertions from the Natural Right theory, it would still constitute a distinct position. In fact, it does more than this. Not only does the Social Good theory assert certain propositions that are uniquely its own, but, since these happen to lie at the very heart of its position, they also affect the interpretation of those propositions it holds in common with the other two basic positions. It agrees with the Natural Right theory, for example, in holding that justice can provide a criterion for law: If a law is unjust, it is to that extent a bad law. But if we ask what it means for a law to be unjust, we receive very different answers from the two theories. The one can claim that a law is unjust because it has violated a natural right—an answer that the Social Good theory would not allow. On this theory, the injustice of a law must result ultimately, not from relation to any supposed natural right but from the fact that it goes counter to the social good of the group whose law it is. The fact that two theories

may express general agreement with regard to one of the fundamental issues does not mean that they do so for the same reasons.

#### PROponents OF THE SOCIAL GOOD THEORY

Baylis	Mill
Bentham	Moore
Blanshard	Pound
Broad	Radbruch
Godwin	Rashdall
Hobhouse	Rawls
Hume	Sidgwick
Ihering*	Smith
Lloyd	Toulmin
Melden	

\* A dialectically difficult author. See above, p. 22.

The same qualifications that were used in categorizing the Positive Law authors apply here. The Social Good theory identified by the six propositions is a dialectical construction, and a writer is counted as a proponent of it if his theory of justice approaches it as a limit or an ideal. All that is claimed is that his writing on justice provides ground for declaring that he would assert each of the six identifying propositions of the theory.

The inclusion of Bentham, Mill, and Sidgwick in the list shows that the theory of justice with which we are now concerned was that held by the classical Utilitarian philosophers. For this reason, it is tempting to call it the Utilitarian theory of justice. Yet to do so would be seriously misleading. There are men on the list—Blanshard, to name only one—who would object to the name, since they would deny either that the social good consists in the greatest good of the greatest number or that pleasure constitutes the only good desirable for itself. Furthermore, there are writers who would be counted as Utilitarians for holding these two positions and yet who would not accept this theory of justice: Austin is an example, since, as we have seen, he holds the Positive Law theory.

Consequently, for the sake of accuracy, it is better not to name the theory after the Utilitarians, even though it still remains true that the classical Utilitarian philosophers provide the paradigm case of the

theory. The writings of Hume, Mill, and Sidgwick are accordingly cited extensively in the documentation of the position. As already noted, the Social Good position falls to some extent between the Positive Law and the Natural Right theories of justice, and shares something with both. The same distribution is found among the three authors taken as paradigm cases of the position. Hume's theory of justice is in many respects close to the Positive Law position, especially in his account of justice as a sentiment. In fact, Sidgwick classifies him with those who identify justice with law observance.<sup>1</sup> This would seem to make him an adherent of the Positive Law theory, although, as will be seen, the balance of evidence is against this classification.

Sidgwick's account of justice, on many issues, approaches that of the Natural Right theory. Mill would thus appear to be left in the middle and, hence, the most paradigmatic of the Social Good position as such. But this is not quite borne out. All three authors are needed for the full statement of the position, since one is better and clearer than another on certain of the fundamental issues.

In constructing the Social Good theory of justice, I will follow the same method that I used in constructing the Positive Law theory. I will formulate in my own language the propositions that serve to identify the theory and the acceptance of which serves to indicate that one is a proponent of it. I will provide documentation to show that the positions asserted in the identifying propositions have in fact been taken in the literature on justice and indicate some of the leading arguments advanced for holding those positions. In the course of doing these things, there also will be occasion to note the way in which the Social Good theory differs from the other basic positions regarding justice, although full discussion of these differences is reserved for Chapter 7.

### THE INDEPENDENCE OF JUSTICE FROM LAW

The way in which the Social Good theory differs from the Positive Law theory is most apparent, of course, from what it has to say about the relation between justice and law. Unlike that theory, it refuses to identify justice with conformity to the positive law.

Sidgwick speaks for all proponents of the Social Good position when he claims that "reflection shows that we do not mean by justice

merely conformity to law." For this claim, he cites three reasons: "First, we do not always call the violators of the law unjust, but only of some laws: not, for example, duellists or gamblers. And, secondly, we often judge that law as it exists does not completely realize justice; our notion of justice furnishes a standard with which we compare actual laws, and pronounce them just or unjust. And, thirdly, there is a part of just conduct which lies outside the sphere of law as it ought to be; for example, we think that a father may be just or unjust to his children in matters where the law leaves (and ought to leave) him free."<sup>2</sup>

Sidgwick's first reason confines itself to the area covered by law and claims that failure to conform to the law does not always, by that very fact, make one unjust. The second looks to the law itself and claims that justice provides a standard for it. The third looks beyond the law to an area where law does not, and should not, apply and yet where justice is still relevant. The three reasons suffice, according to the Social Good theory, to show that justice is a wider notion than law and transcends it.

Social Good authors do not always make all three of Sidgwick's points, and I do not know whether all would accept the first of them as valid. All, however, would assert the second and third. Mill, for example, asserts that "mankind considers the idea of justice and its obligations as applicable to many things which neither are, nor is it desired that they should be, regulated by law." Among these he mentions in particular the details of private life. "Nobody desires that laws should interfere with the whole detail of private life," he writes. "Yet everyone allows that in all daily conduct a person may and does show himself to be either just or unjust."<sup>3</sup>

The standards of justice we appeal to in our private life are not confined to that sphere. They also may be used in more public matters without involving any reference to law. "It is universally considered just," Mill writes, "that each person should obtain that (whether good or evil) which he *deserves*; and unjust that he should obtain a good, or be made to undergo an evil, which he does not deserve. . . . It is confessedly unjust to *break faith* with anyone: to violate an engagement either express or implied, or disappoint expectations raised by our own conduct, at least if we have raised those expectations know-

<sup>2</sup> *Ibid.*, p. 265.

<sup>3</sup> *Utilitarianism*, pp. 58-59.

<sup>1</sup> *Methods of Ethics*, p. 440.

ingly and voluntarily. . . . It is by universal admission inconsistent with justice to be *partial*; to show favor or preference to one person over another, in matters to which favor and preference do not properly apply."<sup>4</sup> In none of these senses is justice dependent upon positive law, Mill claims, and cases can be imagined in which one could use justice in one or another of them without making any reference to law.

The Positive Law theory denies that there is such a thing as a "natural justice," separate and distinct from the norm of justice established by positive law. The adherents of the Social Good theory, however, find nothing wrong in such a notion. Both Mill and Hume use the expression "natural justice." Hume does so in the course of taking issue with Hobbes regarding the contrast between the natural and the civil.

Hume argues against Hobbes that there is such a thing as "natural justice," if by this one understands the justice proper to a condition of society without civil government and positive law. For Hume, unlike Hobbes, both society and justice precede government, and "the state of society without government" is not only conceivable, but it is also "one of the most natural states of men."<sup>5</sup> In this state, contrary to Hobbes, justice is absolutely necessary. "Though it be possible for men to maintain a small uncultivated society without government, 'tis impossible," Hume writes, "they should maintain a society of any kind without justice."<sup>6</sup> In other words, justice is necessary for society and is presupposed by government and politically organized society, or by what Hume calls "civil society." Hence, distinct from civil society with its laws and its justice, there is for Hume a "natural code" and a "natural justice."<sup>7</sup>

For the Social Good theory, positive law is not constitutive of justice. In fact, justice itself, that is "natural justice," provides a criterion for judging the goodness of positive law. When laws become "so perverse as to cross all interests of society," Hume declares that they then lose all authority, and "men judge by ideas of natural justice." So, too, Mill discusses the "repartition of Taxation" in terms of "natural justice."<sup>8</sup> The Social Good authors maintain that laws

<sup>4</sup> *Ibid.*, pp. 54-55.

<sup>5</sup> *A Treatise of Human Nature*, p. 501.

<sup>6</sup> *Ibid.*, p. 541.

<sup>7</sup> *Enquiry Concerning the Principles of Morals*, pp. 196-197, note.

<sup>8</sup> *Op. cit.*, p. 72.

themselves may be just or unjust. Opinions may differ "as to the justice or injustice of infringing" a law, but, Mill claims, "it seems to be universally admitted that there may be unjust laws, and that law, consequently, is not the ultimate criterion of justice."<sup>9</sup>

Justice, for the Social Good theory, is a wider notion than law. Even so, it still can maintain that men ordinarily first think of justice and come to know it in connection with law. Mill says that there can "be no doubt that the *idée mère*, the primitive element, in the formation of the notion of justice, was conformity to law." He writes, "in most, if not in all, languages the etymology of the word which corresponds to 'Just,' points distinctly to an origin connected with the ordinances of law. *Iustum* is a form of *jussum*, that which has been ordered. *Dikaion* comes directly from *dike*, a suit at law. *Recht*, from which came *right* and *righteous*, is synonymous with law."<sup>10</sup>

Proponents of the Social Good position on justice may admit that conformity to the law is the first and best known instance of justice, the *idée mère*, as Mill says. But this of itself does not detract from the position or make it any less opposed to the Positive Law position. What is essential is the claim that law does not exhaust the notion of justice, and, in addition, that justice also provides a criterion for judging the law itself.

### THE DEPENDENCE OF JUSTICE ON SOCIETY

On the issue regarding the relation between justice and law, the Social Good theory disagrees with the Positive Law theory and agrees with the Natural Right theory. Some of its adherents even talk, as we have seen, in terms of "natural justice." Yet the theory is not "naturalist" at all in the sense that the Natural Right theory is. The difference becomes manifest from the position it takes regarding the relation between justice and society.

The heart of the Social Good theory lies in the claim that all questions of justice must ultimately be decided in terms of social utility. All theories of justice agree that justice is a social norm that applies to men in their relations with one another. The Social Good theory goes still further and asserts that the origin and basis of justice lies in the good of society; that is, in a good greater than any indi-

<sup>9</sup> *Ibid.*, p. 54.

<sup>10</sup> *Ibid.*, pp. 57-58.

vidual or private good, achievable only through men acting in common, and one in which individuals can find their own good. Social Good authors may differ about the social good and its determination.

But all would agree that what is just is ultimately decided only by determining what is good for society, and that, whenever a course of action definitely runs counter to that good, it is to that extent unjust. There is no law, no right that falls outside this criterion. All laws and rights are just or unjust according as they conform to the social good and promote it. Justice as a norm rests ultimately upon the social good.

According to the Social Good theory, justice is based entirely on society. It arises in the course of men striving to work out a common life, and, if it were possible for men to live apart from society, there would be no justice and no morality at all. Justice, like the morals of society, grows out of the mores of men. It is evolved by them through their efforts to meet the demands of living together. If the conventional is understood to refer to what is entirely the work of society without any natural basis, then the Social Good position is no less conventional than that of the Positive Law theory. But unlike this latter theory it maintains that society is logically prior to law as well as justice. The theory holds that, while it may make sense to speak of justice where there is no organized government and no positive law, justice makes no sense apart from the good of society.

This theory in its account of justice places emphasis upon the social situation of man and its needs, and not upon man as such in any social situation. The sociality, so to speak, that gives rise to justice is a property of special conditions, not a property belonging in any way to man as such. An individual is in no way naturally just. He is made just by and in society, and all the rights and the rules of justice are entirely made by and conferred by society. The theory holds, accordingly, that there is no natural right, as such, underlying justice and its duties.

Adherents of the Social Good theory assert the dependence of justice upon society in different ways. Hume does so by claiming that justice is an "artificial," not a "natural, virtue." Mill accomplishes the same purpose by tracing the origin of justice to a social feeling. Sidgwick denies that natural right affords a basis for justice. All three arguments are equivalent in asserting the dependence of justice upon society and denying its dependence upon natural right. This position

constitutes the major source of difference from the Natural Right theory and also leads to all that is most characteristic of the Social Good theory of justice as such.

According to Hume, justice is an "artificial virtue." Unlike benevolence or the feeling of sympathy we have for our fellowmen, justice is not a "simple original instinct,"<sup>11</sup> an "innate idea," or an "instinct originally implanted in our nature."<sup>12</sup> For this claim, Hume marshals a variety of reasons, but two principal ones can be distinguished: one from the nature of property, and the other from what might be called the systematic character of justice.

Property, for Hume, constitutes "the object of justice." If justice is natural, then, he argues, there must also be a "simple original instinct" for property. "But who is there that ever heard of such an instinct?" Hume asks.<sup>13</sup> The rights that characterize property are too numerous to be natural; they do not admit of degree, as natural feelings do; and they are often contrary to the common feelings of humanity.<sup>14</sup> On these grounds, Hume concludes that the sense of justice cannot be natural, but must be artificial, or contrived by man—not innate, but acquired. It arises from reflection upon social experience and seeing what is needed for men to live together. Only by looking at the whole network of social relations can we understand, Hume claims, where justice lies. A single act of a "natural virtue," such as benevolence, shows its goodness immediately; we see that it is good to help a fellowman in distress. But a single act of justice, Hume claims, may frequently appear neither good nor just when considered in itself, apart from the larger framework within which it occurs. "Judges take from a poor man to give to a rich; they bestow on the dissolute the labor of the industrious; and put into the hands of the vicious the means of harming both themselves and others." If we separate such judgments from the social fabric to which they belong, Hume claims "it would as often be an instance of humanity to decide contrary to the laws of justice as conformable to them." It is only when we look to the whole social scheme that we find such instances "advantageous to society." This feature of justice, according to Hume, at once distinguishes justice from a natural virtue such as benevolence. "When I relieve persons in distress, my natural humanity is my motive; and so

<sup>11</sup> *Op. cit.*, p. 201.

<sup>12</sup> *A Treatise of Human Nature*, p. 417.

<sup>13</sup> *Enquiry Concerning the Principles of Morals*, p. 201.

<sup>14</sup> See *A Treatise of Human Nature*, pp. 526-532.

far as my succor extends, so far have I promoted the happiness of my fellow-creatures."<sup>16</sup> The goodness of benevolence is evident in every single act, and there is no need to look beyond it to a whole system of relations. That we must do so in the case of justice, Hume takes as showing that justice is an artificial and not a natural virtue.

Hume employs still another argument to show the dependence of justice upon society, which leads into the kind of analysis both Mill and Sidgwick make. If justice were natural to man, independent of his special social situation, then we could expect to find justice wherever we find man. Yet Hume contends that it is easy to imagine situations in which justice would not exist since there would be no need for it. Of this he offers several examples: the golden age of the poets, where men enjoy an abundance of all they want; a society of saints, where every man has perfect benevolence; a condition of such extreme indigence that there is not enough to prevent most of its members from starving; a society of ruffians; Hobbes's state of nature, that is, a society in which there is "no degree of equality"; or the condition of a solitary man who has everything. In any and all of these situations, Hume maintains that there would be no question of justice at all since there would be no function for it to perform.<sup>17</sup>

The need for justice, according to Hume, arises only from the special situation in which man finds himself. "The rules of equity or justice," he writes, "depend entirely on the particular condition in which men are placed."<sup>17</sup> Man has been loaded by nature with "numberless wants and necessities" at the same time that he has been supplied with but the slenderest means of relieving them. Left to himself, he faces all but certain ruin and misery. "His force is too small to execute any considerable work," his labor is so dissipated in satisfying his many different needs that "he never attains a perfection in any particular art," and he constantly faces ruin from the least failure in either his strength or his art. Furthermore, men are naturally partial to themselves, and, with the natural scarcity of material goods, they are only too prone to seize whatever they can for the private use of themselves and their families. Self-interest, however, does not blind man to where his self-interest actually lies. Even though no other passion is naturally strong enough to overbear the

<sup>16</sup> *Ibid.*, p. 579.

<sup>17</sup> *Inquiry Concerning the Principles of Morals*, pp. 183-192.

<sup>18</sup> *Ibid.*, p. 188.

"interested affection," it is capable of being controlled by "an alteration of direction," and, according to Hume "this alteration must necessarily take place upon the least reflection."<sup>18</sup>

In this reflection of man upon his condition and its amelioration, Hume locates the origin and foundation of justice. The acquisitive passions pose the great threat to a peaceable and secure life together, but they can be brought under control by regularizing the possession of the material goods that are their object. "This can be done," Hume writes, "after no other manner than by a convention entered into by all the members of society to bestow stability on the possession of those external goods and leave everyone in the peaceable enjoyment of what he may acquire by his fortune and industry."<sup>19</sup> Justice thus has its origin in "a kind of convention or agreement, i.e. by a sense of interest supposed to be common to all, and where every single act is performed in expectation that others are to perform the like."<sup>20</sup>

Justice, then, is conventional, not natural. This is a position the Social Good theory shares with the Positive Law theory in common opposition to the Natural Right theory. It is important to note, however, that it is not essential to the Social Good theory to identify the conventional character of justice with an explicit social contract theory of government. Not all Social Good authors would place as much emphasis upon property as Hume does. But all would agree with him in denying that the conventional character of justice rests upon a promise. "Nothing can be more absurd," he declares. "The observance of promises is itself one of the most considerable parts of justice, and we are not surely bound to keep our word because we have given our word to keep it." What Hume understands by a convention, and here he is typical of all Social Good authors, is "a sense of common interest, which sense each man feels in his own breast, which he remarks in his fellows, and which carries him, in concurrence with others, into a general plan or system of actions which tends to public utility."<sup>21</sup>

Among the Social Good authors, Rawls is one of the few who finds it useful to analyze justice in terms of an explicit contract. He asks us to "imagine a number of rational and mutually self-interested persons situated in an initial position of equal liberty" engaged in proposing

<sup>19</sup> *A Treatise of Human Nature*, p. 484.

<sup>20</sup> *Ibid.*, p. 489.

<sup>21</sup> *Ibid.*, p. 498.

<sup>22</sup> *Inquiry Concerning the Principles of Morals*, p. 306.

and acknowledging "before one another general principles applicable to their common institutions as standards by which their complaints against these institutions are to be judged." From this imaginary situation, Rawls claims to "derive" the basic principles of justice. For, in such a situation, he maintains that the following two principles would be acknowledged: "(i) Each person participating in the political and social system or affected by it has an equal right to the most extensive liberty compatible with a like liberty for all; and (ii) inequalities (as defined and permitted by the pattern of distribution of rights and duties) are arbitrary unless it is reasonable to expect that they will work out for everyone's advantage, and provided that the positions and offices to which they attach, or from which they may be gained, are open to all."<sup>22</sup>

The fact that Rawls conceives first of justice as a condition that must be accepted if men are to engage in a common enterprise is the main reason for assigning his theory to the Social Good position. It must be admitted that his theory is difficult to classify. He also holds that "the sense of justice" is one of the "fundamental attitudes and capacities included under the notion of humanity," which all men "originally possess."<sup>23</sup> In thus claiming that justice is natural to man, it might be argued that Rawls is better identified as an adherent of the Natural Right theory. Yet the fact that he makes the notion of contract central to his thought, even if only as an "analytical construction," shows that he is better placed with the Social Good authors. Rawls, like Hume, is an example of an author who can maintain that justice is natural in some sense without thereby leaving the Social Good position. What is essential is the subordination of justice to society in such a way that all its principles are made ultimately dependent upon that society and its needs. Rawls's use of the social contract would seem to satisfy this condition. In discussing justice, he maintains that we must view "each person as an individual sovereign," engaged in deciding with others how they are to lead a life together.<sup>24</sup>

The employment of the notion of a social contract as an analytical device does not by itself identify an author with any one of our three basic positions. Authors who use it can be found in all three. Hobbes,

<sup>22</sup> "The Sense of Justice," in *The Philosophical Review*, Vol. 72, 1963, pp. 283-284.

<sup>23</sup> *Ibid.*, pp. 299, 302.

<sup>24</sup> *Ibid.*, p. 304; cf. p. 282.

as we have seen, employs the social contract in developing his Positive Law theory of justice. Locke also uses the notion, as we will see, yet he advocates the Natural Right position. Rawls's use of it differs from both, however, in that he claims to "derive" the basic principles of justice from the social contract situation as implicit in it. For Hobbes, justice is posterior to law as well as to the social contract. For Locke, principles of justice exist even prior to the social contract. But for Rawls, they are implicit in the contract itself.

Mill does not declare as explicitly as Hume that justice is a social convention. Yet he clearly implies as much in the account he gives of the origin of justice. In his account he is mainly concerned with the source of the sanction of justice, that is, with its obligatoriness. Hence, most of what he has to say is more appropriate to the consideration of that issue. We are concerned now only with seeing how he makes justice depend upon society.

There are "two essential ingredients in the sentiment of justice," Mill claims, "the desire to punish a person who has done harm, and the knowledge or belief that there is some definite individual or individuals to whom harm has been done."<sup>25</sup> The desire to punish a person who has done harm he analyzes as "a spontaneous outgrowth from two sentiments . . . the impulse of self-defence and the feeling of sympathy."<sup>26</sup> He holds that "it is natural to resent, and to repel or retaliate any harm done or attempted against ourselves or against those with whom we sympathize." The desire to punish arises in us even when we are not ourselves the immediate object of injury. The purely self-regarding feeling is transcended or widened by sympathy and intelligence with the result that "a human being is capable of apprehending a community of interest between himself and the human society of which he forms a part, such that any conduct which threatens the security of the society generally, is threatening to his own, and calls forth his instinct (if instinct it be) of self-defence."<sup>27</sup>

Mill thus attributes to sympathy the function of socializing, as it were, the otherwise self-regarding feeling of self-defence and retaliation. Yet, in itself, at this stage, the feeling is still nonmoral; it "has nothing moral in it." As a "natural feeling," it makes us "resent indiscriminately whatever anyone does that is disagreeable to us." It

<sup>25</sup> *Op. cit.*, p. 62.

<sup>26</sup> *Ibid.*, p. 63.

becomes moral only when there is "an exclusive subordination of it to the social sympathies, so as to wait on and obey their call." Mill says that the natural feeling is "moralized by the social feeling" when "it only acts in the directions conformable to the general good." We may be thinking only of the individual case when we feel our sentiment of justice outraged, and not thinking of society at large, or of any collective interest. But, according to Mill, "a person whose resentment is really a moral feeling, that is, who considers whether an act is blamable before he allows himself to resent it—such a person, though he may not say expressly to himself that he is standing up for the interest of society, certainly does feel that he is asserting a rule which is for the benefit of others as well as for his own. If he is not feeling this—if he is regarding the act solely as it affects him individually—he is not consciously just; he is not concerning himself about the justice of his actions."<sup>28</sup> Thus, for Mill, as for Hume, justice implies in itself and in its origin the "interest of society."

Although Rawls is critical of the classical Utilitarians, he still agrees with the Social Good position, as we have seen. Justice, he writes, supposes mutual recognition of principles by the participants in a common practice.<sup>29</sup> Questions about justice arise "when free persons who have no authority over each other are engaged in joint activity and settling rules which define it and determine shares in benefits and burdens."<sup>30</sup> It involves "acknowledgement of constraint required by fair play" and recognition that it is unfair "if one accepts benefit of practice but refuses to do his part in maintaining it."<sup>31</sup> Justice as fairness thus involves essentially the notion of social as opposed to antisocial behavior.

A. I. Melden shows his adherence to the Social Good theory by declaring that "it is self-evident—analytic—that it is right that one maintain the moral community of which one is a member. To be right is the very same thing as to be the kind of action that does serve, however that may be, the moral community."<sup>32</sup> What is right or moral, hence also what is just, is so precisely because it is necessary to the existence of the community.<sup>33</sup>

<sup>28</sup> *Ibid.*, p. 64.

<sup>29</sup> *Op. cit.*, p. 106.

<sup>30</sup> *Ibid.*, p. 93.

<sup>31</sup> *Ibid.*, pp. 95–96.

<sup>32</sup> *Rights and Right Conduct*, p. 71.

<sup>33</sup> See *ibid.*, pp. 76–77.

According to Roscoe Pound, justice is not an individual virtue, nor an ideal relation among men, but "such an adjustment of relations and ordering of conduct as will make the goods of existence . . . go round as far as possible with the least friction and waste."<sup>34</sup> C. H. Broad would agree with him that justice is only derivatively applied to individual acts, since it is "a special kind of intrinsic good, a property only of very complex states of affairs concerning distribution."<sup>35</sup> For both, justice is to be found only where men are associated together in some form of common life; it is a good of society.

The assertion that justice is entirely dependent on society carries the denial that there is any such thing as a natural right having its basis in man as man. The Social Good theory thus denies that nature or the natural as such provides a basis for justice.

Sidgwick represents all adherents of the theory when he asserts that "no definition that has ever been offered of the Natural exhibits this notion as really capable of furnishing an independent ethical first principle."<sup>36</sup> He claims that natural right provides no standard for man's social relations. The appeal to natural right "presents a problem and not a solution," since it involves finding "in the rights and obligations established by custom in a particular society at a particular time an element that has a binding force beyond what mere custom can give."<sup>37</sup> He allows that "justice is generally, though somewhat vaguely, held to prescribe the fulfillment of all such expectations (of services, etc.) as arise naturally and normally out of the relations voluntary or involuntary, in which we stand towards other human beings."<sup>38</sup> But he claims that this notion of "natural expectation" is not only indefinite, it is "worse than indefinite" in that it conceals a "fundamental conflict of ideas . . . for the word 'natural,' as used in this connection, covers and conceals the whole chasm between the actual and the ideal—what is and what ought to be. . . . The term seems, as ordinarily used, to contain the distinct ideas of (1) the common as opposed to the exceptional, and (2) the original or primitive as contrasted with the result of later conventions and institutions. But it is also used to signify . . . 'what would exist in an

<sup>34</sup> *Social Control*, p. 65.

<sup>35</sup> Qu. in Lyons, *Forms and Limits of Utilitarianism*, p. 173.

<sup>36</sup> *Methods of Ethics*, p. 83.

<sup>37</sup> *Ibid.*, pp. 82–83.

<sup>38</sup> *Ibid.*, n. 269.

ideal state of society."<sup>39</sup> This confusion, plus the fact that men disagree about the ideal, suffice to show, according to Sidgwick, that the natural provides no criterion for determining what is just.

Mill, too, denies natural right. His essay "Nature" is devoted to refuting the claim that nature in any way constitutes a moral norm for human action. Yet, in his political and social writings, he frequently defends what other writers would call natural rights. His work *On Liberty* analyzes and defends the liberties of individuals and stakes out wide areas of individual choice and determination with which, he claims, society has no right to interfere and to subordinate to social control. In *Representative Government*, he declares expressly that "it is a personal injustice to withhold from any one, unless for the prevention of greater evils, the ordinary privilege of having his voice reckoned in the disposal of affairs in which he has the same interest as other people."<sup>40</sup> Yet he refuses to admit that in all this there is any such thing as a natural right. He declares that he foregoes "any advantage which could be derived to the argument from the idea of abstract right."<sup>41</sup>

Mill's position on liberty is important for understanding the Social Good position as a whole. Its assertion of the conventionality of justice with the consequent denial of natural right does not thereby establish society as an end in itself to which an individual is totally subordinated. Nor does it imply that societies and states cannot be judged in terms of justice. Mill, in fact, would willingly admit that one state is more just than another precisely to the extent that it gives fuller recognition to individual liberties. But as warrant for this claim he would not appeal to natural right. Instead, he holds that such a course of action is more efficient and results in a better society, since each individual is supposed to be the best judge of his own interests.

Individual liberty may be claimed as a requirement of justice by any of the three basic theories. Where they differ lies, not in the claim but in the reason they offer for it. The Social Good position makes it a need of society, or a means for insuring a better society. The Positive Law theory holds that it is an option that has been written into law, while the Natural Right theory maintains that it is a right due to man as man.

<sup>39</sup> *Ibid.*, pp. 272-273.

<sup>40</sup> *Representative Government*, p. 475.

## SERVING THE SOCIAL GOOD

For the Social Good theory, justice is not coterminous with positive law, nor is it based on natural right. What then is justice, what term is basic to its analysis, how is it best defined? To these questions, the theory answers with the term that best names the whole position: Justice consists in serving and promoting the social good. This is to claim that the good of society is prior to both law and right in the root meaning of justice, and that both of the other notions are in a subordinate position. Law itself is just or unjust according as it serves or fails to serve the good of society. So too, rights belong to man only as he is associated with others in a society.

Since our paradigm authors are the classical Utilitarian philosophers, this position is asserted by the claim that justice is based on utility. Thus, Hume writes that the virtue of justice "derives its existence entirely from its necessary use to the intercourse and social state of mankind."<sup>42</sup> Its rules "owe their origin and existence to that utility which results to the public from their strict and regular observance."<sup>43</sup> Although self-interest may have furnished "the original motive to the establishment of justice," he declares that "sympathy with the public interest is the source of the normal approbation which attends the virtue."<sup>44</sup>

Mill holds that "the idea of justice supposes two things: a rule of conduct and a sentiment which sanctions the rules."<sup>45</sup> Like Hume, he traces the moral character, that is its power of commanding an ought, to its being a sentiment. But this sentiment he traces to utility—justice, as he says, is "only a particular branch of general utility."<sup>46</sup> If the justice or injustice of an action were "intrinsically peculiar and distinct from all its other qualities," if the feeling itself were "*sui generis* like our sensations of color and taste," then there would be a source and criterion of morality distinct from utility. Mill recognizes that the idea of justice so interpreted constitutes "one of the strongest obstacles to the reception of the Utilitarian doctrine."<sup>47</sup> He

<sup>42</sup> *Enquiry Concerning the Principles of Morals*, p. 186.

<sup>43</sup> *Ibid.*, p. 188.

<sup>44</sup> *A Treatise of Human Nature*, pp. 499-500.

<sup>45</sup> *Utilitarianism*, p. 65.

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# PRECEDENT IN ENGLISH LAW

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relate to the activity of the judges. He would want to know whether there were any reported cases on the point, because, under the doctrine of precedent, much English law is derived from the decisions and observations of judges which are to be found in the different series of law reports. As this book is mainly concerned with the doctrine of precedent, it is a work on one aspect of the topic of the sources of law.

Another division of jurisprudence is into particular and general. Particular jurisprudence is concerned with the fundamental assumptions of one legal system, whereas general jurisprudence covers a wider field. According to Austin (1790-1859), general jurisprudence is the study of the 'principles, notions and distinctions' common to the maturer systems of law. This book is confined to the operation of precedent in English law. It may therefore be called a work on particular jurisprudence, although several questions of a general nature are raised.

The operation of precedent in England is compared with its operation elsewhere in Chapter I. Chapters II, III, and IV deal with different aspects of the English doctrine of precedent. In Chapter V case-law is related to the other sources of English law. Chapter VI touches on the subject of legal reasoning upon which case-law has had its influence, while Chapter VII is concerned with the bearing of the doctrine of precedent on such questions of legal theory as the definition of law and the distinction between law, fact, and discretion. These divisions are not water-tight. Problems of legal theory are mentioned before Chapter VII is reached, and, all through the book, attention is drawn to the merits and demerits of various points in the English doctrine of precedent.

Much of the book, like the whole of this introduction, will no doubt seem to the trained lawyer to be unduly simple. Before he condemns it on this score the reader may perhaps be asked to bear in mind the following words of Austin:

The elements of a science are precisely the parts of it which are explained least easily. Terms that are the largest, and, therefore, the simplest of a series, are without equivalent expressions into which we can resolve them concisely. And when we endeavour to define them, or to translate them into terms which we suppose are better understood, we are forced upon awkward and tedious circumlocutions.

## I

THE ENGLISH DOCTRINE OF  
PRECEDENT

## I. PRELIMINARY STATEMENT

It is a basic principle of the administration of justice that like cases should be decided alike. This is enough to account for the fact that, in almost every jurisdiction, a judge tends to decide a case in the same way as that in which a similar case has been decided by another judge. The strength of this tendency varies greatly. It may be little more than an inclination to do as others have done before, or it may be the outcome of a positive obligation to follow a previous decision in the absence of justification for departing from it. Judicial precedent has some persuasive effect almost everywhere because *stare decisis* (keep to what has been decided previously) is a maxim of practically universal application. The peculiar feature of the English doctrine of precedent is its strongly coercive nature. English judges are sometimes obliged to follow a previous case although they have what would otherwise be good reasons for not doing so.

*Case-law*

The strongly coercive nature of the English doctrine of precedent is due to rules of practice, called 'rules of precedent', which are designed to give effect to the far more fundamental rule that English law is to a large extent based on case-law. 'Case-law' consists of the rules laid down by judges in giving decisions. In a system based on case-law, judges in subsequent cases must have regard to these rules; the rules are not, as in some other legal systems, merely material which the judge in a later case may take into consideration in coming to his decision. The fact that English law is largely a system of case-law means that the judge's decision in a particular case constitutes a 'precedent'. If we place ourselves in the position of a judge, we shall see that the

may simply be obliged to consider the former decision as part of the material on which his present decision could be based, or he may be obliged to decide the case before him in the same way as that in which the previous case was decided unless he can give a good reason for not doing so. Finally, the judge in the instant case may be obliged to decide it in the same way as that in which the previous case was decided, even if he can give a good reason for not doing so. In the last-mentioned situation the precedent is said to be 'binding' or of 'coercive effect' as contrasted with its merely 'persuasive' effect in the other situations in which the degree of persuasiveness may vary considerably.

Some branches of our law are almost entirely the product of the decisions of the judges whose reasoned judgments have been reported in various types of law report for close on 700 years. Other branches of our law are based on statutes, but, in many instances, case-law has played an important part in the interpretation of those statutes. As the sovereignty of Parliament is more complete in England than practically anywhere else in the world, it might be thought that the rigidity of the doctrine of precedent in this country is of no particular importance because any unsatisfactory results of case-law can be swept away by legislation, but the promotion of a statute on matters of this nature is often slow and difficult. There are many instances in which the recommendations of Royal Commissions and Law Revision Committees, designed to ameliorate the situation produced by case-law, have been ignored, apparently for no other reason than pressure on parliamentary time.

The number of such instances will probably be reduced in the future because there are now in existence several very important law-reforming agencies, notably the Law Reform Committee dealing with the reform of the civil law on matters referred to it by the Lord Chancellor, the Criminal Law Revision Committee dealing with the reform of the criminal law on matters referred to it by the Home Secretary, and, most important of all, the Law Commission. The Commission was set up by statute in 1965, and it is charged with the task of reviewing the law with a view to systematic development and reform, including in particular, codification. When the work of the Law Commission results, as it probably will do, in codes of the more important branches of English law, the role of case-law will, *pro tanto*, be diminished.

### Rules of precedent

The rules of precedent are dependent on the practice of the courts, which has varied considerably. As recently as 1948 it was possible for Dr. Goodhart, one of the leading contemporary writers on precedent, to say: 'The English doctrine of precedent is more rigid today than it ever was in the past.'

Since then, however, there have been pronounced signs of relaxation, and they culminated in 1966 in a very important Practice Statement, set out in full on p. 107 in which the Lord Chancellor said that, while, in general, the House of Lords would continue to treat its past decisions as binding on it, it would modify its then present practice by departing from a past decision when it thought right to do so. Under the practice prevailing between 1898 and 1966, the House considered itself absolutely bound by its past decisions, and there had been pronounced tendencies in this direction throughout the nineteenth century.

At present the English doctrine of precedent is to some extent in a state of flux, but there appear to be three constant features. These are the respect paid to a single decision of a superior court, the fact that a decision of such a court is a persuasive precedent even so far as courts above that from which it emanates are concerned, and the fact that a single decision is always a binding precedent as regards courts below that from which it emanates. These points will be better understood in the light of a brief account of the hierarchy of the English courts.

### The hierarchy of the courts

It will be convenient to begin with the civil courts. At the bottom of the hierarchy there are the County and Magistrates' Courts with a limited jurisdiction over cases of first instance. Next comes the High Court whose judges exercise an unlimited jurisdiction over such cases. The Divisional Courts, which are part of the High Court, enjoy a limited appellate jurisdiction in addition to hearing certain special applications in the first instance. Next in the hierarchy of civil courts comes the Court of Appeal (Civil Division) which hears appeals from the County Courts and the High Court. Finally, there is the House of Lords which hears appeals from the English Court of Appeal,

the Court of Sessions in Scotland, and the Court of Appeal in Northern Ireland.

So far as the criminal courts are concerned, the Magistrates' Courts exercise an important summary jurisdiction over cases of first instance. A convicted person has a right of appeal to Quarter Sessions in a summary case, but the most important appellate and supervisory work in relation to summary jurisdiction is done by the Divisional Courts of the Queen's Bench Division of the High Court. Trials on indictment take place at Quarter Sessions or Assizes. A person convicted on indictment may appeal to the Court of Appeal (Criminal Division) whence an appeal lies to the House of Lords, provided the requisite leave is obtained.

#### *Preliminary statement of the English doctrine of precedent*

The Practice Statement in the House of Lords shows how easily the rules of precedent can be changed, but the following preliminary statement represents the practice current at the end of 1967. Every court is bound to follow any case decided by a court above it in the hierarchy, and appellate courts (other than the House of Lords) are bound by their previous decisions.

There is room for debate over certain matters of detail, and it cannot be denied that this statement is wholly inaccurate in one respect, although a trivial one. The inaccuracy concerns the effect of a decision of Quarter Sessions. They are above the Magistrates' Courts in the hierarchy of criminal jurisdiction, but a Magistrates' Court is not bound by their previous decisions, and, though they are an appellate court in summary cases, Quarter Sessions are not bound by their past decisions. The inaccuracy is trivial because the doctrine of precedent is primarily of importance in relation to 'superior' courts whose decisions on questions of law are regularly reported. The decisions of 'inferior' courts (a technical term comprising Magistrates' Courts, Quarter Sessions, and County Courts) are not included in any series of law reports in daily use, and, in the absence of reports, the doctrine of *stare decisis* is liable to be ineffective. There are, however, some serious reasons why the above preliminary formulation of the English doctrine of precedent is too concise and dogmatic. It does not indicate that only

binding, it does not indicate that, although the decisions of High Court judges are only coercive (if they are coercive anywhere<sup>1</sup>) in the inferior courts, they are of great persuasive authority in the superior courts and it does not refer to the existence of important exceptions to the doctrine of *stare decisis*. These matters are discussed in subsequent chapters. The purpose of the present chapter is to contrast the modern English rules of precedent with the rules of precedent as applied in other countries today, and in England at other times.

## 2. ILLUSTRATIONS

The first of the features of the English doctrine of precedent mentioned above, the respect paid to a single decision of a superior court, may be illustrated by the treatment of *R. v. Mills* in *Beamish v. Beamish*. In *R. v. Mills*,<sup>2</sup> for doubtful historical reasons, and without much previous authority, the House of Lords adopted the rule that the presence of an episcopally ordained priest is essential, at common law, to a valid marriage in England or Ireland with the result that an Irish Presbyterian marriage was held void. Though greatly modified by statute and, to some extent, by later decisions, the case has caused much trouble. It is rendered all the more impressive as an illustration of the effectiveness of a single decision by the fact that the members of the House of Lords who voted whether to accept the advice of the judges were evenly divided. The decision of the Irish Appellate Court, which was against the validity of the marriage, was accordingly only affirmed on the principle *prae-sumitur pro negante*. A motion had been proposed, and as it had not been carried, it was deemed to have been defeated.

In *Beamish v. Beamish*,<sup>3</sup> the House of Lords decided that the fact that the bridegroom was in Holy Orders did not prevent the rule in *R. v. Mills* from applying. In order that the marriage should be valid, the priest had to be present as a celebrant, not as a party to the ceremony. Lord Campbell had disapproved

<sup>1</sup> The binding authority of a decision of a High Court judge is very tentatively doubted, so far as a County Court is concerned, in *Salmond v. Salmond* (1910) 101 F.T.R. 101.

of the view which prevailed in the previous case; but, in *Beamish v. Beamish*, he said:

If it were competent to me, I would now ask your Lordships to reconsider the doctrine laid down in *R. v. Millis*, particularly as the judges who were then consulted complained of being hurried into giving an opinion without due time for deliberation, and the members of this House who heard the argument, and voted on the question, 'that the judgment appealed against be reversed', were equally divided; so that the judgment which decided the marriage by a Presbyterian clergyman of a man and woman, who both belonged to his religious persuasion, who both believed that they were contracting lawful matrimony, who both lived together as husband and wife, and who had procreated children while so living together as husband and wife, to be a nullity, was only pronounced on the technical rule of your Lordships' House, that where, upon a division, the numbers are equal, *semper praesumitur pro negante*. But it is my duty to say that your Lordships are bound by this decision as much as if it had been pronounced *nemine dissente*, and that the rule of law which your Lordships lay down as the ground of your judgment, sitting judicially, as the last and supreme Court of Appeal for this Empire, must be taken for law till altered by an act of Parliament, agreed to by the Commons and the Crown, as well as by your Lordships. The law laid down as your *ratio decidendi*, being clearly binding on all inferior tribunals, and on all the rest of the Queen's subjects, if it were not considered as equally binding upon your Lordships, this House would be arrogating to itself the right of altering the law, and legislating by its own separate authority.

The second feature of the English doctrine of precedent mentioned on p. 5, the fact that a decision of a superior court is treated as persuasive by courts above that court in the hierarchy, may be illustrated by the treatment of *Simonin v. Mallac*<sup>1</sup> by the House of Lords in *Ross-Smith v. Ross-Smith*.<sup>2</sup>

*Simonin v. Mallac* was a decision of the full court of Divorce and Matrimonial Causes which slightly antedated the modern hierarchy; its decisions were and are in no way binding on the House of Lords. It was held that the English courts have jurisdiction to hear a petition for nullity of marriage on the ground that the marriage was void *ab initio* because of a defect in the ceremony if it was celebrated in England although the parties

<sup>1</sup> (1860), 2 Sw. & Tr. 67.

<sup>2</sup> [1963] A.C. 240.

were domiciled in France (i.e. had their permanent home there), and the husband was temporarily resident in Naples. The ground of the decision was that, 'The parties by professing to enter into a contract in England mutually gave to each other the right to have the force and effect of that contract determined by an English tribunal.'

*Ross-Smith v. Ross-Smith* was considered by seven members of the House of Lords, one of whom died before he could deliver his speech, although he had prepared it. The speech was read, but the case must presumably be regarded as having been decided by six members of the House. None of them accepted the *ratio decidendi* of *Simonin v. Mallac* which has just been quoted; but a precedent may be a persuasive authority although it does not persuade, especially if it has been followed, as *Simonin v. Mallac* had been followed, on a number of occasions. Lord Reid said:

Before holding that the decision should be overruled I must be convinced not only that the *ratio decidendi* is wrong but that there is no other possible ground on which the decision can be supported.<sup>2</sup>

Being unable to find any such ground, Lord Reid and two of his colleagues were prepared to overrule *Simonin v. Mallac* but, as the House was evenly divided on this point, they ultimately based their conclusion, as did two other members of the House, on the ground that the decision in *Simonin v. Mallac* must be confined to marriages alleged to be void; the sixth member of the House dissented, and would have extended *Simonin v. Mallac* to the case before him.

The issue in *Ross-Smith v. Ross-Smith* was whether the English courts have jurisdiction to annul a marriage on the ground that it is voidable on account of wilful refusal or incapacity to consummate, if the marriage was celebrated in England, though the parties are domiciled elsewhere and the husband resides abroad. By a majority of five to one, the House of Lords gave a negative answer.

Whether a decision of the full court of Divorce and Matrimonial Causes is binding on a judge of first instance is perhaps a somewhat knotty point, but the fact that *Simonin v. Mallac* had

<sup>1</sup> (1860), 2 Sw. & Tr. 67, at p. 75.

<sup>2</sup> [1963] A.C. at p. 294.

been impliedly treated as good law by the Court of Appeal and the treatment accorded to it in the House of Lords in *Ross-Smith v. Ross-Smith* were enough to induce Sir Jocelyn Simon P. to treat himself as bound by it in *Padolecchia v. Padolecchia*.<sup>1</sup> We thus have an illustration of the third feature of the English doctrine of precedent mentioned on p. 5. However anomalous a decision of a superior court may be (and the treatment accorded to *Simonin v. Mallac* has been judicially described as 'the perpetuation of error'),<sup>2</sup> once it has received the blessing of an appellate court, it binds all courts below that court in the hierarchy.

### 3. COMPARISON WITH FRANCE

Although there are important differences between them, the French legal system may be taken as typical of those of western Europe for the purposes of the present discussion.

From the standpoint of strict legal theory, French law is not based on case-law (*la jurisprudence*) at all. The Civil and Penal Codes are theoretically complete in the sense that they (and other statutory provisions) are supposed to cover every situation with which the ordinary courts are concerned. It can still be argued that, strictly speaking, case-law is not a source of law in France because a judge is not obliged to consider it when coming to a decision. Art. 5 of the Civil Code forbids his laying down general rules when stating a decision, and it would be possible for a French appellate court to set aside a ruling founded exclusively on a past decision on the ground that the ruling lacked an adequate legal basis.<sup>3</sup> None the less, there is a substantial body of case-law dealing with the construction of the Codes and the solution of problems on which they are in fact silent. Moreover, the *droit administratif* of the Conseil d'État, which is not numbered among the ordinary courts, is mainly based on case-law.

From the practical point of view one of the most significant differences between English and French case-law lies in the fact

that the French judge does not regard himself as absolutely bound by the decision of any court in a single previous instance. He endeavours to ascertain the trend of recent decisions on a particular point. To quote a distinguished French legal writer: 'The practice of the courts does not become a source of law until it is definitely fixed by the repetition of precedents which are in agreement on a single point.'<sup>1</sup> Although it has been suggested that statements of this nature do something less than justice to the influence of an occasional single decision on the development of French law,<sup>2</sup> there can be little doubt that a French judge would not have shared Lord Campbell's inhibitions about differing from *R. v. Millis*.

Three of the principal reasons for the difference between the French and English approaches to the doctrine of precedent are that the need for certainty in the law was formerly felt more keenly by the English judge than most of the judges on the Continent, the highly centralized nature of the hierarchy of the English courts, and the difference in the position of the judges in the two countries.

#### *The need for certainty*

The first point has been stressed by Dr. Goodhart. The continental judge has no doubt always wanted the law to be certain as much as the English judge, but he has felt the need less keenly because of the background of rules provided first by Roman law and codified custom, and later by the codes of the Napoleonic era. These resulted in a large measure of certainty in European law. Roman law was never 'received' in England, and we have never had a code in the sense of a written statement of the entirety of the law. 'English justice, if it were not to remain fluid and unstable, required a strong cement. This was found in the

<sup>1</sup> Lambert, 'Case-method in Canada', 39 *Yale L.J.* 1 at p. 14. A helpful account of the operation of precedent in France together with examples of the judgments of French courts is given by Lawson, 'Negligence in Civil Law', pp. 231-5. See also Esmein, *Revue trimestrielle de droit civil*, v. i, p. 5 (1902); *Encyclopédie Dalloz*, v. iii, p. 17; 'Le Droit privé français', by Ripert, v. i, p. 9. In Spain it seems that two decisions of the Supreme Court constitute a 'doctrina' binding on inferior courts.

common-law doctrine of precedent with its essential and peculiar emphasis on rigidity and certainty.<sup>1</sup>

### *The hierarchy of the courts*

The French judicial system is based on the division of the country into districts. So far as civil cases are concerned, each district has a court of first instance and a court of appeal. The district courts of first instance are not bound by their own previous decisions or those of any other district court of first instance, nor are such courts of first instance bound by the previous decisions of their own appellate court or that of any other district. The district appellate courts are not bound by their own past decisions or those of any other district court of appeal. There is a right of appeal on points of law from the district appellate court to the *cour de cassation* in Paris. In theory, this body is not bound by any previous decision of its own, and the district courts are not bound to follow an individual decision of the *cour de cassation* in a previous case. So far as the actual litigation under consideration by the *cour de cassation* is concerned, that court may remit it for re-hearing by an appellate court of a district near to that from which the appeal came, and, if the case should be brought before the *cour de cassation* again, that court may remit it to yet another district court of appeal with a binding direction concerning the manner in which the case is to be decided.

The more serious criminal cases are tried by a district assize court from which there is no appeal apart from the possibility of an application to the *cour de cassation* on a question of law which may result in an order for a new trial.

With a system of courts as decentralized as that which has just been sketched, it would have been difficult for France to have evolved a doctrine of precedent as rigid in every respect as our own. Even if the *cour de cassation* had come to treat itself and the district courts as absolutely bound by each of its past decisions, there would almost inevitably have been considerable flexibility at the level of the district courts of appeal. It would have been too much to expect anything approximating to the uniformity of decision demanded of the English judges. French law owes its uniformity to the various codes in which it is

<sup>1</sup> 'Precedent in English and Continental Law', 50 *L.Q.R.* 40 at p. 62, (1934).

declared and to *la doctrine*—the opinions of jurists—rather than to *la jurisprudence*.

### *The different position of the judges*

The French judge occupies a very different position from that of his English counterpart. In the first place, there are fewer judges of our superior courts than there are members of the French judiciary. Secondly, the French judiciary is not, like ours, recruited from the Bar but from the civil service, and thirdly, many French judges are relatively young and inexperienced men. They go into the Ministry of Justice with the intention of taking up a judicial career and become junior judges in small district courts after what is little more than a period of training. The result is that the judiciary tends to be considered as less important in France than in England, and, although it is difficult to assess the significance of these matters, it is generally, and probably rightly, assumed that they help to explain the greater regard which is paid to case-law in this country than that which is paid to it on the Continent. Still more important is the fact that the judges have been the architects of English law.

The common law is a monument to the judicial activity of the common law judge. He, not the legislator or the scholar, created the common law. He still enjoys the prestige of that accomplishment.<sup>1</sup>

Notwithstanding the great theoretical difference between the English and French approaches to case-law, and the total absence of rules of precedence in France, the two systems have more in common than might be supposed. In the first place, French judges and writers pay the greatest respect to the past decisions of the *cour de cassation*.<sup>2</sup>

Secondly, the manner in which the English judges interpret the *ratio decidendi* of a case tends to assimilate their attitude towards a legal problem to that of their French counterparts. In *Wells v. Hopwood*,<sup>3</sup> for example, the Court of King's Bench had to decide whether a vessel had been 'stranded' within the meaning

<sup>1</sup> Von Mehren, *The Civil Law System*, 839.

<sup>2</sup> 'On peut dire sans paradoxe que la cour de cassation a plus de respect pour les arrêts de ses chambres réunies que pour la loi elle-même, car s'il lui arrive d'altérer ou de modifier la loi sous couleur de l'interpréter, elle n'abandonne jamais la jurisprudence créée par un arrêt des chambres réunies': *Encyclopédie Dalloz*, v. iii, p. 22, para. 36.

<sup>3</sup> (1832), 3 B. & Ald. 20.

of a charter party. A number of previous decisions had some bearing on this point, and Lord Tenterden C.J. dealt with them in the following terms:

Several of the cases hitherto decided on this subject are very near to each other, and not easily distinguishable. But it appears to me that a general principle and rule of law may, although perhaps not explicitly laid down in any of them, be fairly collected from the greater number.<sup>1</sup>

Lord Tenterden proceeded to formulate a principle on the basis of which he solved the problem before him. This is a common type of judicial reasoning in England, and further reference will be made to it in due course. It means that several cases dealing with the same point may have to be read together in order to determine the proposition of law for which any one is authoritative at a given time. It would be wrong to say that, in deciding case D, an English High Court judge of first instance considers cases A and B, decided by the Court of Appeal, together with case C, decided by another High Court judge of first instance, in order to see whether the law has become 'definitely fixed by the repetition of precedents which are in agreement on a single point'. However, his attitude towards the *ratio decidendi* of case A might be profoundly affected by the observations of the judges in cases B and C. English case-law is not the same as *la jurisprudence*, but it is a mistake to suppose that our judges permanently inhabit a wilderness of single instances. If, for the time being, we ignore the difference in the form in which the English and French judges express their conclusions, it seems that the divergence between the two systems is most noticeable when there is only one important decision on the point before the court, as was the case in *Beamish v. Beamish*. It is quite possible that a French judge of first instance would have felt himself as much bound to follow *Simonin v. Mallac* as did Sir Jocelyn Simon in *Padolecchia v. Padolecchia*, although this would be on account of the fact that *Simonin v. Mallac* had been followed on numerous occasions rather than on account of the fact that the decision had received the blessing of appellate courts on relatively few occasions. A further respect in which the two systems of case-law differ

<sup>1</sup> At p. 34. For a modern example, see *Unit Construction Company Ltd. v. Bullock*, [1960] A.C. 351 at p. 368 per Lord Radcliffe.

## COMPARISON WITH FRANCE

profoundly is due to art. 5 of the Civil Code which prohibits a judge from laying down general rules. It is not uncommon for the judgments of English appellate courts to lay down rules, concerning the quantum of damages for example, to be followed by lower courts in the future. This could hardly happen in France.

## 4. CONTRAST WITH U.S.A.

Although the North American practice of giving judgment in the form of elaborate discussions of previous cases is more like the English than the continental, the United States' Supreme Court and the appellate courts in the different States do not regard themselves as absolutely bound by their past decisions. There are many instances, some American lawyers would say too many, in which the Supreme Court has overruled a previous decision.

Although, thanks to the change of practice in the House of Lords, the English rules of precedent may approximate more closely to the North American, two reasons why the North American rules should remain more lax suggest themselves. These are the number of separate State jurisdictions in the former country and the comparative frequency with which the North American courts have to deal with momentous constitutional issues.

### *Numerous jurisdictions*

A multiplicity of jurisdictions produces a multiplicity of law reports which has, in its turn, influenced the teaching of law and led to the production of 'restatements' on various topics. The 'case method' of instruction which, in one form or another, prevails in most North American law schools, aims at finding the best solution of a problem on the footing of examples from many jurisdictions, and few schools confine their instruction to the law of any one State. The restatements are concise formulations and illustrations of legal principles based on the case-law of the entire United States and, from time to time, model codes and sets of uniform rules relating to various branches of the law are produced in a similar manner.

method and who are familiar with the restatements and kindred documents will tend to concentrate on recent trends after the fashion of the French courts.

### *Constitutional issues*

When a court is construing a written constitution the terms of that document are the governing factor and the case-law on the meaning of those terms is only a secondary consideration. This point was put very clearly by Frankfurter J. when he was giving judgment in the Supreme Court. He said:

The ultimate touchstone of constitutionality is the Constitution itself, and not what we do about it.<sup>1</sup>

A further reason why North American courts in general, and the United States' Supreme Court in particular, should not apply our rule of the absolutely binding effect of a single decision to constitutional matters is provided by the momentous nature of the issues involved in such cases. To quote Lord Wright:

It seems clear that, generally speaking, a rigid method of precedent is inappropriate to the construction of a constitution which has to be applied to changing conditions of national life and public policy. An application of words which might be reasonable and just at some time, might be wrong and mischievous at another time.<sup>2</sup>

When the difficulty of amending the Constitution of the United States is borne in mind, it is scarcely surprising that the Supreme Court has become less and less rigorous in its adherence to the principle of *stare decisis*.

### 5. CONTRAST WITH SCOTLAND

The following remarks made by a Scottish court as recently as 1960 certainly suggest that the Scottish doctrine of precedent is less strict than our own.

<sup>1</sup> *Graves v. New York*, 306 U.S. 466 at p. 491 (1939). The importance of the fact that the United States' Supreme Court is frequently concerned with constitutional problems is stressed by Goodhart in 'Case Law in England and America' in *Essays in Jurisprudence and the Common Law*. See also Goodhart, 'Some American Interpretations of Law', in *Modern Theories of Law*, p. 1.

<sup>2</sup> 'Precedents', 8 C.L.J. 118 at p. 135.

### CONTRAST WITH SCOTLAND

If it is manifest that the *ratio decidendi* upon which a previous decision has rested has been superseded and invalidated by subsequent legislation or from other like cause, that *ratio decidendi* ceases to be binding.<sup>1</sup>

No doubt it would be quite incorrect to represent the English judiciary as a body which pays no attention to the maxim *cessante ratione cessat lex ipsa*, but it is difficult to find as forthright an utterance of the maxim as that which has just been quoted from Scotland in any modern English law report.

The collegiate nature of the Court of Session, the superior civil court in Scotland, may account for such differences as there are in the application of the doctrine of precedent north and south of the Tweed. The Lords Ordinary hear cases of first instance in the Outer House of the Court of Session, and an appeal lies to the Inner House. The Lords Ordinary are bound to follow the past decisions of the Inner House. The Inner House sits in divisions, and it appears to be a moot point whether the divisions are absolutely bound by each other's decisions. Provision may be made for the hearing of a case by the whole Court of Session, and although it seems clear that the divisions of the Inner House as well as the individual Lords Ordinary are bound by the decisions of the whole court, it also seems to be a moot point whether the decisions of the whole court are binding on subsequent sessions of that body. The Lords Ordinary are not bound by each other's decisions, and, in theory at least, their decisions do not bind the Sheriffs whose courts are lower in the Scottish judicial hierarchy.

The more serious criminal cases come before the High Court of Justiciary. The judges sit singly and in quorums. A single judge is not bound to follow the decisions of other single judges, but he must follow the previous decisions of a quorum. The quorums are bound by the previous decisions of other quorums of an equal or greater number. A full bench may be assembled for a difficult case. It is not clear whether the decisions of a full bench bind a similar tribunal convened for a later case. An appeal lies to the House of Lords in civil cases only.

<sup>1</sup> *Beith's Trustees v. Beith*, [1950] S.C. 66 at p. 70; see also *Douglas-Hamilton v. Duke and Duchess of Hamilton's ante-nuptial marriage contract trustees*, [1961] S.L.T. 905 at p. 309. For the operation of precedent in Scotland see *Precedent in Scots Law*, by T. B. Smith.

The decisions of the House on a Scottish appeal bind the courts of Scotland. In practice, if not according to strict legal theory, they also bind the English courts below the House of Lords on points on which the law of the two countries is the same.<sup>1</sup>

#### 6. CONTRAST WITH PARTS OF THE COMMONWEALTH

The Judicial Committee of the Privy Council used to be the final court of appeal for all Commonwealth countries outside the United Kingdom. The Judicial Committee has never considered itself to be absolutely bound by its own previous decisions on any appeal. The form in which the decisions are expressed is often said to militate against the adoption of a rigid rule of precedent, for the judgment of the Committee consists of advice tendered to the Sovereign together with the reasons upon which such advice is based. Another factor which makes for a less strict rule of *stare decisis* is the comparative frequency with which the Privy Council is called upon to deal with appeals on questions of constitutional law, but there are several cases which were not concerned with constitutional law in which the Committee has dissented from the advice which it gave on a former occasion.<sup>2</sup> The Judicial Committee is, however, strongly disposed to adhere to its previous decisions.<sup>3</sup> The decisions of the Privy Council are only of strong persuasive authority in the English courts.

The right of appeal to the Privy Council has been abolished in some Commonwealth countries, including Canada. In the days when there was still an appeal to the Privy Council, the Supreme Court of Canada regarded itself as bound by its own past decisions although there was a saving clause relating to 'exceptional circumstances'.<sup>4</sup> Since the abolition of the right of appeal to the Privy Council, the Supreme Court of Canada has claimed the power of declining to follow its own past decisions as

<sup>1</sup> *Glasgow Corporation v. Central Land Board*, [1956] S.C. (H.L.) 1.

<sup>2</sup> e.g. *Mercantile Bank of India v. Central Bank of India*, [1938] A.C. 287 and *Gideon Nkumbule v. R.*, [1950] A.C. 379.

<sup>3</sup> *Fatima Binti Mohamed Bin Saleem and Another v. Mohamed Bin Salim*, [1952] A.C. 1.

<sup>4</sup> *Stewart v. Bank of Montreal* (1909), 41 S.C.R. 522 at p. 535. See '*Stare Decisis* in the Supreme Court of Canada', by Andrew Iwan, 36 *Canadian Bar Review* 174.

#### CONTRAST WITH PARTS OF THE COMMONWEALTH 19

it is the successor to the final appellate jurisdiction of the Privy Council which is not bound by its own past decisions.<sup>1</sup>

Although an appeal still lies to the Privy Council from the High Court of Australia, that Court does not regard itself as absolutely bound by its own past decisions.<sup>2</sup> As long ago as 1879 it was said to be of the utmost importance that in all parts of the Empire where English law prevails, the interpretation of that law by the courts should be as nearly as possible the same.<sup>3</sup> It is for this reason that, in the absence of some special local consideration to justify a deviation, the Australian and Canadian courts would be loath to differ from decisions of the House of Lords, but there does not appear to be any question on the decisions of the House being binding in either country. The High Court of Australia in fact stated that a leading decision of the English criminal law (since largely overruled by an English statute) was to be treated as no authority in Australia,<sup>4</sup> and the Judicial Committee of the Privy Council has held in a civil case that the Australian High Court was right not to follow a decision of the House of Lords on exemplary damages.<sup>5</sup>

The desirability of having the same common law throughout the Commonwealth is not as self-evident as it is sometimes made to appear. Much depends on the branch of the law concerned. In commercial matters, for example, where members of the different Commonwealth countries are liable to be affected by the same rule, there is much to be said for uniformity; but the demand for uniformity in other spheres may militate against useful developments. For historical reasons, Australian and Canadian judges may, *faute de mieux*, have to start their thinking with English law, but there is no obvious merit in their binding themselves to adopt the English solution. The first answer to a legal problem is not necessarily the right one, and each of two answers may be equally meritorious.

#### 7. HISTORY

The upshot of the foregoing summary of the operation of the doctrine of precedent in other countries is that it is more difficult

<sup>1</sup> *Re Farm Products, Marketing Act* (1957), 7 D.L.R. (2nd) 257 at p. 271.

<sup>2</sup> *A.G. for N.S.W. v. Perpetual Trustees Co.* (1952), 85 C.L.R. 189.

<sup>3</sup> *Trimble v. Hill*, 5 App. Cas. 342 at p. 345.

to get rid of an awkward decision in England than almost anywhere else in the world. The English doctrine of precedent was not always as strict as it is today. The importance of case-law has been emphasized since the days of the year books, and there are signs that the system was becoming rigid in the eighteenth century, but the strict rule summarized at the beginning of this chapter is the creature of the nineteenth and twentieth centuries. It could only come into being when law reporting had reached its present high standard, when the hierarchy of courts assumed something like its present shape, and when the judicial functions of the House of Lords were placed in the hands of eminent lawyers as they are today. The standard of law reporting was high at the beginning of the nineteenth century, but the hierarchy of courts and the judicial functions of the House of Lords did not assume their present form until after 1850.

As late as 1869 a judge of first instance seems to have had no compunction in delivering a judgment in which he did no more than say that a decision of the Court of Appeal in Chancery was clearly mistaken and that he must therefore decline to follow it.<sup>1</sup> In spite of the clear manner in which it was stated by Lord Campbell in *Beamish v. Beamish*,<sup>2</sup> the former rule that the House of Lords was absolutely bound by its past decisions was not completely settled until the end of the nineteenth century.<sup>3</sup> As late as 1852 Lord St. Leonards had used the following words when addressing the House of Lords:

You are not bound by any rule of law which you may lay down, if upon a subsequent occasion you should find reason to differ from that rule; that is, that this House, like every court of justice, possesses an inherent power to correct an error into which it may have fallen.<sup>4</sup>

The rule that the Court of Appeal is, in general, absolutely bound by its past decisions is the product of this century.<sup>5</sup> As late as 1903 the Court acted on the contrary view<sup>6</sup> and that view was repeated in the course of a judgment in the Court of Appeal as

<sup>1</sup> *Collins v. Lewis*, L.R. 8 Eq. 708.

<sup>2</sup> *London Street Tramways v. L.C.C.*, [1898] A.C. 735.

<sup>3</sup> *Bright v. Hutton*, 3 H.L.C. 343 at p. 388.

<sup>4</sup> *Young v. Bristol Aeroplane Co.*, [1944] K.B. 718.

<sup>5</sup> *Wynne-Finch v. Chaytor*, [1903] 2 K.B. 475.

## HISTORY

recently as 1938.<sup>1</sup> It is only in the present century that the Divisional Courts have come to apply the principle of *stare decisis* in its full rigour to their own past decisions.

No historical account would be complete without a reference to two further features of English case-law. These are the judges' practice of reasoning by analogy and what has been described as 'the declaratory theory' hallowed by Coke, Hale, and Blackstone. According to this theory, the decisions of the judges never make law, they merely constitute evidence of what the law is. The practice of reasoning by analogy is the same today as it has been for a long time, but the declaratory theory no longer holds sway.

### Reasoning by analogy

It is possible to quote passages from the time of Bracton onwards as evidence that reasoning by analogy is a commonplace of English judicial procedure. Writing in the thirteenth century Bracton said:

If any new and unwonted circumstances shall arise, then, if anything analogous has happened before, let the case be adjudged in like manner, proceeding *a similibus ad similia*.<sup>2</sup>

Six hundred years later Parke, B., spoke in substantially the same terms in *Mirehouse v. Rennell*<sup>3</sup> when he said:

Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of obtaining uniformity, consistency and certainty, we must apply those rules where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised.

The rule of *stare decisis* causes the judges to reason by analogy because the principle that like cases must be decided alike involves the analogical extension of the decision in an earlier case. Allowance must also be made for the converse principle that

<sup>1</sup> *Re Shoosmith*, [1938] 2 K.B. 637 at p. 644.

<sup>2</sup> *De Legibus*, c. 1 (b).

<sup>3</sup> (1833), 1 Cl. & F. 527 at p. 546.

dissimilar cases should be decided differently. It is only necessary to open a contemporary English law report in order to find a judge of our own day stating that there is or is not a material distinction between a previous case and the case before him. It is this approach to legal problems by proceeding from case to case which marks one of the main differences between the judicial process in common-law countries (including the United States) and the judicial process on the continent. The principle of *stare decisis* may be applied so laxly in the United States that the American judge appears to be nearly as little fettered by past cases as his French counterpart, but the appearance is superficial. A French critic would say that the English and American judges were equally victims of *la superstition du cas*.

The similarities and differences in the reasoning with regard to precedent which is commonly employed by the English and American judges are strikingly revealed by the following passage in a book by an American legal writer of the twentieth century. He says the question before the judge is:

Grant that there are differences between the cited precedent and the case at Bar, and assuming that the decision in the earlier case was a desirable one, is it desirable to attach legal weight to any of the factual differences between the instant case and the earlier case?<sup>1</sup>

The author of these words was writing of the United States. The first question for the English judge would concern the authority of the earlier decision. If it was that of a court whose decisions were binding upon him, he would follow it unless he thought that a reasonable distinction existed between it and the case before him and regarded the distinction as one upon which he should act. If the earlier decision was of merely persuasive authority, the English judge would follow it unless he was able to give cogent reasons for not doing so. (In this context, a 'reasonable' distinction means one which a lawyer might reasonably consider to be relevant having regard to the existing state of the law.) There is, of course, a difference between following a previous decision because of the absence of a convincing distinction between it and the instant case, and following a previous decision because a reasonable distinction which exists between it and the instant case is not regarded as one

which should be acted upon.<sup>1</sup> In the latter situation the previous decision is 'applied' rather than 'followed', and the difference between the two procedures is often, though not invariably, recognized in English legal terminology.

### *The declaratory theory of judicial decision*

Sir Matthew Hale, writing in the seventeenth century, stated the declaratory theory by asserting that the decisions of courts cannot

make a law properly so called, for that only the King and Parliament can do; yet they have a great weight and authority in expounding, declaring, and publishing what the law of this Kingdom is, especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times, and though such decisions are less than a law, yet they are a greater evidence thereof than the opinion of any private persons, as such whatsoever.<sup>2</sup>

In the eighteenth century Blackstone said 'the decisions of courts of justice are the evidence of what is common law'.<sup>3</sup> As late as 1892 Lord Esher said:

There is in fact no such thing as judge-made law, for the judges do not make the law though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable.<sup>4</sup>

The doctrine of Hale and Blackstone appears to have been that the common law consists of the usages and customary rules by which Englishmen have been governed since time immemorial supplemented by general principles of private justice and public convenience, and liable to be varied by Act of Parliament. This was the characteristic approach of the eighteenth-century judge towards the situation which was not covered by case-law. Thus, Willes J. said:

Private justice, moral fitness and public convenience, when applied to a new subject, make common law without precedent, much more when received and approved by usage.<sup>5</sup>

<sup>1</sup> See the judgment of Roxburgh J. in *Re House Property & Investment Co. Ltd.*, [1954] Ch. 576 at p. 601.

<sup>2</sup> *History of the Common Law* (6th ed.), p. 90.

<sup>3</sup> *Commentaries* (13th ed.), vol. i, pp. 88-89.

<sup>4</sup> *Willis v. Baddeley*, [1892] 2 Q.B. 324 at p. 326.

<sup>5</sup> *Millar v. Taylor* (1769).

It is difficult to be a great deal more explicit in the twentieth century about the basis of judicial reasoning when there is no precedent, but, when there is a precedent, orthodox theory has ceased to maintain that the precedent is no more than evidence of the moral fitness, public convenience, or conformity to usage of a rule derived from a previous decision or series of decisions. Such a rule is law 'properly so called' and law because it was made by the judges, not because it originated in common usage, or the judges' idea of justice and public convenience. Holdsworth once wrote in a manner suggesting that the views of Hale and Blackstone represent twentieth-century judicial doctrine,<sup>1</sup> but it is difficult not to share the scepticism of Dr. Goodhart who asked in reply whether it would be possible today for counsel to argue that a judgment of the House of Lords is not law because it conflicts with the settled principles of the common law.<sup>2</sup>

So far as Lord Esher's statement is concerned, the application of existing law to new circumstances can never be clearly distinguished from the creation of a new rule of law. Moreover, if there is no such thing as judge-made law, it is impossible to account for the evolution of much legal doctrine. For example, it is a matter of common knowledge among legal historians that the requirement of consideration in the law of contract is based on a series of decisions which can be cited by name. The effect of the requirement is that a promise, which is not contained in a deed, is legally void unless the promisee suffered some detriment in return for the promise when it was made. The doctrine has nothing to do with the ancient usages of Englishmen, and it is no part of the common stock of morality or justice; in fact, it is frequently criticized because it occasionally fosters immorality and promotes injustice by permitting the promisor to break his promise with impunity. One result of the requirement of consideration is that A may write to B offering to sell his house to him, promising to keep the offer open for a fortnight, and, seven days later, when B is about to accept the offer, tell him that he cannot do so because the house has been sold to C.

No one has ever denied that the rules of equity laid down by

<sup>1</sup> 'Case-Law', 50 *L.Q.R.* 180, (1934).

<sup>2</sup> *Ibid.* 196.

the Court of Chancery owe their authority to the fact that they are judge-made. Sir George Jessel said:

It must not be forgotten that the rules of courts of equity are not, like the rules of the common law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved, and refined from time to time. In many cases we know the names of the chancellors who invented them.<sup>1</sup>

Most modern lawyers would repudiate the remarks of Lord Esher and consider that Mellish L.J. came nearer to the truth when he said:

The whole of the rules of equity and nine-tenths of the common law have in fact been made by judges.<sup>2</sup>

From the historical point of view there is a slight element of truth in the declaratory theory because medieval judges sometimes did regard themselves as charged with the duty of ascertaining, and declaring, and enforcing contemporary customs and usages. From the analytical point of view, on the other hand, the theory is inconsistent with several aspects of the English doctrine of precedent. Two fundamental assumptions of that doctrine are first, that a judge is bound to follow a previous decision, and secondly, that appellate courts may overrule the previous decisions of courts beneath them in the hierarchy, provided they are not precluded from doing so by a decision which is binding upon them or by an Act of Parliament. If a previous decision is only evidence of what the law is, no judge could ever be absolutely bound to follow it, and it could never be effectively overruled because a subsequent judge might always treat it as having some evidential value.

There are, however, at least two good reasons why the declaratory theory should have persisted for some time after the modern English doctrine had begun to take shape. In the first place, it appealed to believers in the separation of powers, to whom anything in the nature of judicial legislation would have been anathema. Secondly, it concealed a fact which Bentham

<sup>1</sup> *Re Hallett's Estate* (1880), 13 Ch. D. 696 at p. 710.

<sup>2</sup> *Aiken v. Jackson* (1875), 1 Ch. D. 399 at p. 405; see also Sir Kenneth Diplock, *Courts as Legislators*, p. 2.

was anxious to expose, namely, that judge-made law is retrospective in its effect. If in December a court adjudges that someone is liable, in consequence of his conduct during the previous January, it would certainly appear to be legislating retrospectively, unless the liability is based on an earlier Act of Parliament, or unless the court is simply following a previous decision. A way of disguising the retrospective character of such a judgment would be to maintain the doctrine that the court really was doing no more than state a rule which anyone could have deduced from well-known principles or common usage, for the conduct in question would then have been prohibited by the law as it stood in January.

So far as the first reason for the persistence of the declaratory theory is concerned, it is only necessary to observe that the fact that our judges can and do make law is now universally recognized by writers on the British Constitution. Indeed, they use that fact as one of several illustrations of the impossibility of accepting the doctrine of the separation of powers in a rigid form.

The second reason must be discussed at slightly greater length. One of Bentham's comments on judge-made law is particularly famous. He said, 'it is the judges who make the common law', and continued:

Do you know how they make it? Just as a man makes law for his dog. When your dog does anything you want to break him of, you wait till he does it and then beat him. This is the way you make laws for your dog, and this is the way the judges make law for you and me.<sup>1</sup>

The merits of this criticism of judge-made law may be considered in the light of two famous decisions of the nineteen-thirties, each of which was thought by a number of contemporary lawyers to have effected a considerable change in the law. In *R. v. Manley*<sup>2</sup> a woman was convicted in 1933 of doing acts constituting a public mischief in December 1932. She had falsely told the police that she had been robbed with the result that the time of the police had been wasted in fruitless investigation, and a number of innocent people had been brought under suspicion. Many contemporary lawyers would have said that, although the crime of doing acts tending to the public mischief was known

<sup>1</sup> *Works*, 5, 235.

<sup>2</sup> [1933] 1 K.B. 529.

to the common law, it did not cover conduct such as that of which Mrs. Manley had been guilty. Her conviction was, however, affirmed by the Court of Criminal Appeal (the predecessor of the Criminal Division of the Court of Appeal). In doing so that Court did not act under any statute prohibiting conduct of the kind which was charged against the accused, and it could not be said to have followed any past decision. Former cases were cited in the judgment, but they could easily have been distinguished from the instant case. What the Court of Criminal Appeal did was to apply *dicta* in old cases to a situation which had not been contemplated by the judges responsible for them and, by so doing, they declared in 1933 that acts performed in 1932 were criminal although, in 1932, many lawyers would have said that such acts were merely anti-social.

Our second illustration of the retrospective effect of judge-made law is provided by *Donoghue v. Stevenson*,<sup>1</sup> a decision reached by a majority of 3 to 2 in the House of Lords on the hearing of a Scots appeal in 1932. A woman and her friend visited a café in Paisley where the friend ordered for her some ice-cream and a bottle of ginger beer. These were supplied by the shopkeeper, who opened the ginger-beer bottle and poured some of the contents over the ice-cream which was contained in a tumbler. The woman drank part of the mixture, and the friend then proceeded to pour the remaining contents of the bottle into the tumbler. As she was doing so, a decomposed snail floated out of the ginger beer. In consequence of having drunk part of the contaminated contents of the bottle, the woman alleged that she contracted a serious illness. The bottle was stated to have been of dark opaque glass, so that the condition of the contents could not have been ascertained by inspection. The shopkeeper was merely the retailer of the ginger beer and the question before the courts was whether the woman could recover damages as compensation for her illness from the manufacturer, assuming that she could prove that they, or their servants, were negligent in permitting, or failing to guard against the presence of the snail in the bottle. Cast into the terminology of the English law which was said to be the same as the law of Scotland on the point under consideration, the problem was whether the manufacturer owed a duty of care

<sup>1</sup> [1932] A.C. 562.

to the ultimate consumer. Before 1932 most lawyers would have answered this question in the negative. On the authority of a number of earlier cases, they would have said that the manufacturers had broken their contract with the wholesaler or retailer who bought the ginger beer from them, but that did not entitle the consumer to sue them in tort. Had she bought the drink from the shopkeeper she would have been able to recover damages for breach of contract from him, but, as things were, the majority of contemporary lawyers would have said that she had no legal remedy. The majority of the House of Lords came to the opposite conclusion. They were not bound to follow the earlier cases, and they explained away or condemned a number of *dicta* in them. Most lawyers of today would agree that the decision of the majority placed the law on a rational basis, but the fact remains that most lawyers of 1932 would have advised the manufacturers that they were not legally liable. The manufacturers won in the Court of Session, and, when sitting as a court, the House of Lords legislated retrospectively by overruling *dicta*, if not decisions, by which the Court of Session considered itself bound. Blackstone would have said that the House declared that a decision or dictum overruled by it was not bad law, 'but that it was not law, that is, that it is not the established custom of the realm as has been erroneously determined'.<sup>1</sup>

Nothing is to be gained by concealing the truth in this way, and it is better to admit that, in situations such as those with which the cases of *R. v. Manley* and *Donoghue v. Stevenson* were concerned, the courts make new law with retrospective effect. Such an admission does not imply a whole-hearted acceptance of Bentham's condemnation of judge-made law. Retrospective legislation is only pernicious if it entails liability for conduct which might well have been different if the agent had known of the terms of the subsequent law. This is not the case with much new law which is made by judges. It is difficult to believe, for instance, that the accused in *R. v. Manley* or the manufacturers in *Donoghue v. Stevenson* would have conducted themselves differently had they known that the law was what the Court of Criminal Appeal and House of Lords later declared it to be. Hardships may arise where contracts held to be valid by an

<sup>1</sup> *Commentaries* (13th ed.), vol. i, p. 87.

earlier decision are declared void by an appellate court in a later case. The justification for the decision of the appellate court is that the social hardship of continuing an unsatisfactory rule is greater than the individual hardship suffered by those who may have made contracts on the faith of the earlier decision. In any event, retrospective judicial legislation must surely be a necessary evil once it is granted that we have not got, and cannot have, an unambiguous and all-embracing legal code, and that not all possible legal issues are covered by past decisions. Judges must decide cases as they arise: when the facts are not clearly covered by a statute, when there is room for two views concerning the meaning of statutory words, and when no past decision is clearly in point. The possibility that past cases should only be over-ruled prospectively is examined in Chapter VIII but, subject to this, what can our judges do but make new law and how can they prevent it from having retrospective effect? One reason why greater hardship is not caused by the retrospective operation of judge-made law is that a very great deal of our law is settled beyond the possibility of serious controversy.

#### *Limitations of judicial legislation*

With all its faults, the declaratory theory obscurely expressed a truth which became more and more rigorous. The truth is that of *stare decisis* became more and more limited. One or more of the judges' power of making law is very limited. Decisions may create a rule, and that rule may be extended as those decisions are applied to new circumstances, but the judges cannot alter judge-made law once it is firmly established, any more than they can ignore the clear words of a statute. There may often be a difference of opinion, as there was in *Donoghue v. Stevenson*, on the question whether judge-made law is too firmly established to be altered by the judges, but no one denies that it can easily become incapable of alteration except by legislation. The limited nature of the judicial power was once put very vividly by Holmes J., one of the greatest American judges, when he said:

I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motion. A common law judge could not say, I think

the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court.<sup>1</sup>

The modern English judge is at a disadvantage as a law-maker when contrasted with the legislature because he cannot unmake law which has been effectively declared by statute or, in spheres in which there is no statute, by decisions which are binding upon him according to our doctrine of precedent. He is subject to the even greater restriction that he can only make law on such specific issues as happen to be litigated before him and his powers are further circumscribed by the fact that, according to the generally accepted theory, he ought to confine his propositions of law to matters covered by the arguments of counsel. Thus, four of the five members of the House of Lords who heard the appeal in *Rahimtoola v. The Nizam of Hyderabad*,<sup>2</sup> dissociated themselves from that part of Lord Denning's speech in which he said

I have considered some questions and authorities which were not mentioned by counsel. . . . If there is one place where they should be reconsidered on principle—without being tied to particular precedents of a period that is past—it is here in this House, and if there is one time for it to be done, it is now, when the opportunity offers, before the law gets any more enmeshed in its own net.

Notwithstanding the obscurely expressed truth which the declaratory theory contains, most legal writers would now approve of the references made by Austin in lectures delivered between 1828 and 1832, to

the childish fiction employed by our judges that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity and merely declared from time to time by the judges.<sup>3</sup>

Nevertheless, the theory was beneficial in at least one respect. It provided a court with an excellent reason not to follow or apply a case of which it strongly disapproved. While the doctrine was in force, it appeared natural to say that if the common law consists of principles, of reason, justice, and convenience, a previous decision may be rejected on the ground that it is

<sup>1</sup> *South Pacific Co. v. Jensen* (1917), 244 U.S. 205.

<sup>2</sup> [1958] A.C. 379 at p. 423.

<sup>3</sup> *Jurisprudence* (5th ed.), vol. ii, p. 635.

unreasonable, unjust, or inconvenient. In *Mirehouse v. Rennell*<sup>1</sup> Parke B., believed by some to have been 'the greatest legal pedant that ever existed',<sup>2</sup> appears to have recognized that rules derived from precedent might be ignored if they were plainly unreasonable and inconvenient. It is possible to point to a number of instances at the beginning of the nineteenth century in which judges declined to follow a previous decision because it was 'absurd',<sup>3</sup> because it 'cannot be supported in principle',<sup>4</sup> or because it 'does not convince'.<sup>5</sup> In 1802 Lord Eldon said of a previous decision:

I feel it to be my duty to understand the principle of the case

before I confirm it, or to decide against it upon a principle stated from this place so clear that there can be no doubt upon it.<sup>6</sup> ✓ 812

These words were echoed by Sir George Jessel as late as 1880 when he said:

The only thing in the judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided, but it is not sufficient that the case should have been decided on a principle if that principle is not itself a right principle, or is not applicable to the case; and it is for a subsequent judge to say whether or not it is a right principle, and, if not, he may himself lay down the true principle, in that case the prior decision ceases to be a binding authority or guide for any subsequent judge, for the second judge who lays down the true principle in effect reverses the decision.<sup>7</sup>

Today no one would doubt that it is only the principle upon which the case was decided which binds a subsequent judge, and no one would doubt that the principle must be applicable to the case before him if the subsequent judge is to be bound by it, but, assuming that the principle derived from the first case is applicable to the case before the subsequent judge, the extent to which he can refuse to act upon it, because it is not a right principle, is greatly limited by the doctrine of precedent. Once it is recognized that a rule laid down by a judicial decision is law because it is so laid down, the source of the judicial

<sup>1</sup> p. 21 *supra*.

<sup>2</sup> Letter quoted in Lord Hanworth's *Life of Pollock*, C.B., p. 190.

<sup>3</sup> *Vere v. Cawdor and King* (1809), 11 East. 568.

<sup>4</sup> *Wickes v. Gordon* (1819), 2 B. & Ald. 335.

<sup>5</sup> *R. v. St. Mary's Leicester* (1818), 1 B. & Ald. 327.

<sup>6</sup> *Aldrich v. Cooper*, 8 Ves. 382 at n. 289.

decision, whether it be another decision, a dictum in a previous judgment or a principle of justice and convenience, ceases to be relevant from the point of view of binding authority. All that matters is the precedent and this must be followed if, according to our doctrine of precedent, it is binding, although it is not regarded as a right principle by the judge who is considering the matter. We shall see that there are exceptions to the rule of *stare decisis* today, but, unlike the exceptions of the nineteenth century, they are not based on the declaratory theory. Even if it was a childish fiction, that theory unified the exceptions to *stare decisis* that were recognized in the eighteenth century and throughout much of the nineteenth century. We shall see that the current exceptions to the doctrine are as miscellaneous as they are ill defined.

The influence of the declaratory theory has been considerable, and further reference will be made to it from time to time in this book. The very justifiable reaction against it which has taken place during the past hundred years must never be allowed to blind us to the fact that the judge is more often engaged in applying the law than making it. In most litigation the issue is one of fact, not law. It so happens, however, that factual disputes do not give rise to problems in relation to the doctrine of precedent, and that is why comparatively little is said about them in these pages. When a judge applies undisputed law to facts found by him or the jury, he is not acting on any theory of precedent, declaratory, creative or otherwise. He is simply assuming or confirming that the law is as others have stated it to be.

### 8. JUDICIAL REGRETS

Although the English doctrine of precedent has not lacked encomia, it has also been the subject of judicial regrets. Speaking in the days when the House of Lords held itself absolutely bound by its past decisions, Lord Reid said in *Nash v. Tamplin & Sons Brewery Brighton Ltd.*:<sup>1</sup>

It matters not how difficult it is to find the *ratio decidendi* of a previous case, that *ratio* must be found. It matters not how difficult it is to reconcile that *ratio* when found with statutory provisions or

<sup>1</sup> [1952] A.C. 231.

general principles, that *ratio* must be applied to any later case which is not reasonably distinguishable.<sup>2</sup>

In *Radcliffe v. Ribble Motor Service Ltd.*<sup>3</sup> the House of Lords declared itself unable to depart from the doctrine of common employment on account of previous decisions of the House. The doctrine in question was that under which a servant injured by the negligence of his fellow servant was disabled from claiming damages from his master at common law although the injury was sustained in circumstances in which a stranger could have successfully sued the master if he had been injured by the negligence of one of that master's servants. The doctrine had troubled the courts for the better part of a century, and everyone connected with *Radcliffe's* case would have agreed that it was unjust and ill suited to modern conditions. Lord Atkin even went so far as to say that the decision on which the common employment rule was based

proceeded on a fallacious proposition from first to last—namely, that the doctrine of *respondent superior* only applies to strangers.<sup>4</sup>

The House was incapacitated from overruling the doctrine by the practice concerning the absolutely binding effect of its previous decisions; even today it is open to question whether the House of Lords would be prepared to overrule any doctrine that had been as thoroughly established by case-law. The doctrine of common employment was held to be inapplicable to the facts of *Radcliffe's* case but continued to plague the courts until it was abolished by statute in 1948.

When they are unable to detect a rational distinction between the instant case and a former unsatisfactory decision which binds them, the lot of the judges of the Court of Appeal may be as unenviable as that of the members of the House of Lords. In *Olympia Oil & Cake Co. Ltd. v. Produce Brokers Ltd.*,<sup>5</sup> Buckley L.J. said:

I am unable to adduce any reason to show that the decision which I am about to pronounce is right. . . . But I am bound by authority which, of course, it is my duty to follow.

Phillimore L.J. said:

With reluctance—I might almost say with sorrow—I concur in

<sup>2</sup> [1952] A.C. at p. 250.

<sup>3</sup> At p. 228.

<sup>4</sup> [1939] A.C. 215.

<sup>5</sup> (1915), 112 L.T. 744 at p. 750.

the view that this appeal must be dismissed. I trust that the case will proceed to the House of Lords.

The case did proceed to the House of Lords where the appeal was allowed, Lord Sumner observing that the members of the Court of Appeal had been right in indicating objections to the earlier decisions, although they were bound to follow them.<sup>1</sup> One of the most perplexing features of the English doctrine of precedent from the point of view of legal theory is the precise status of pronouncements by one court concerning the practice to be followed by a court below it in the hierarchy with regard to the previous decisions of that lower court.

The law reports are full of observations like that of Lord Sumner to the effect that a lower court was right to follow one of its past decisions; on the other hand, there is much force in the following observation of Diplock L.J.:

Indeed, it is difficult to see how a pronouncement by the House of Lords which did not form part of the reasons for judgment in any appeal before it could have any binding effect on any other court. In the Court of Appeal we are bound by judicial decisions of the House of Lords, but so far as concerns the binding effect on the Court of Appeal of its own decisions, our fetters too are self-imposed.<sup>2</sup>

The only difficulty is that the rule that the Court of Appeal is bound by the decisions of the House of Lords, could also be described as self-imposed.

<sup>1</sup> [1916] 1 A.C. at p. 334.

<sup>2</sup> *Boys v. Chaplin*, [1968] 1 All E.R. at p. 296.

(12)

# **Important Points on Cultural & Educational Rights**

(Articles 29 & 30)

LLM 1<sup>st</sup> Year

Paper - 02 Chapter - 7

## **I. Meaning & Concept of 'Minorities' :-**

**In Re. the Kerala Education Bill, 1957, (AIR 1958 SC 956)**

On facts it was held that Christians, Muslims and Anglo Indians were minorities in Kerala with reference to rights U/Art. 30(1).

**International Encyclopedia on Social Sciences, Vol. 10 Page 365.**

"Minority is a group of people differentiated from others in the same society by race, nationality, religion or language who both think of themselves as a differentiated group and are thought of by the others as a differentiated group with negative connotations."

## **II. Cultural and Educational Rights :-**

### **(i) Protection of Interest of Minorities U/Art. 29:**

The word minority in Art. 29 appears only in marginal notes and not in the main text of the Article. This shows that the intention of the framers of the Constitution was to use minority in a wider sense. Hence, it can be availed by any section of citizens. Under this Articles citizens have right to conserve their language, script or culture of their own.

### **(ii) Rights of Minorities to Establish and Administer Educational Institutions U/Art. 30:**

#### **1. Two Rights conferred U/Art. 30:**

- a. **Right to Establish:** To create an Institution
- b. **Right to Administer:** As has been held in  
**Md. Joynal Abedin v. State, AIR 1990 Cal 193.**

“Management of affairs of Institution must be free of external control, so that the founder or their nominees can manage the Institution as they think fit and in accordance with their ideas of how best the interest of community in general and institution in particular will be served.

## 2. Minorities based on Religion or Language:

### 3. Relationship between Art. 29(1) and 30(1):

In **St. Xavier's College v. State of Gujarat** AIR 1974 SC 1389 it is held that

	Art. 29(1)	Art. 30(1)
1.	Confers right on any section of citizens including majority	Confers right only on minorities based on religion or language.
2.	It is concerned with three subjects viz., language, script or culture.	It deals with minorities based on language or religion.
3.	It is concerned with right to conserve language, script or culture	Deals with rights of minorities to establish and administer educational institution of their choice.
4.	It does not deal with education.	It only deals with establishment and administration of E.I.

## 4. No Absolute Right and Power of Government to Regulate Minority Run Institutions:

- Right to run U/Art. 30(1) is not an Absolute Right and it is not free from any regulations. The regulatory measures are necessary for orderly, efficient and sound administration of an Institution. Right to administer implies a co-relative duty to good administration and not as a right to maladministration.
- In **Re. the Kerala Education Bill, 1957** AIR 1958 SC 956: The S.C. has held that State can insist certain conditions while granting aid to the Minority Educational Institution and upheld the conditions

designed to give protection and security to ill paid teachers as permissible.

- **Sidhrajibhai v. State of Gujarat** AIR 1963 SC 540: The S.C. has held that regulation can be made to prevent Educational Institution running without qualified teachers, health, sanitation, morality, public order etc. but the regulatory measures should not destroy the character of minority institution.
- **St. Xaviers College v. State of Gujarat** AIR 1974 SC 1389: It is held that the Governing Body of an Educational Institution is part of administration and the right to administer is exercised through choice of its personnel. So, the provisions of the impugned act displace management and entrust the administration into different agency. Hence, violative of Art. 30(1).
- **All Saints High School v. Govt. of A.P.** AIR 1980 SC 1042: It is held that the impugned Act conferred wide power substantially interfering with rights of minorities to administer educational institution. Hence, violated rights under Art. 30(1)
- **Bihar State Madarasa Education Board v. M.H.A. College** (1990)1 SCC 428: The condition prescribing for dissolution of management committee of Madarasa in the event of violations of the conditions imposed by the Board was struck down. The SC held that state has no power under the guise of regulatory power to completely take over management of Minority Educational Institution.
- **St. Stephen's College v. University of Delhi** (1992) 1 SCC 558 : The circular issued by the University was held to be unconstitutional on the ground that a minority college is not bound to follow University circulars. Because it would deprive the minority character of educational institution. Right to select students is important facet of administration.

##### **5. Whether Right of Recognition or Affiliation is Fundamental Right:**

- There is no Constitutional Right to receive state aid outside Art. 337 which is a special provision with

respect to educational grants for the benefit of Anglo Indian Community.

- **St. Stephen's College v. Delhi University** AIR 1992 SC 1630: The SC has held that there is no Fundamental Right for recognition / affiliation. If the conditions placed for recognition / affiliation amount to surrender of minority rights, then it is violative of Art. 30(1).
- **Managing Board of Milli Talimi Mission v. State of Bihar** (1984) 4 SCC 500: In this case the petitioner was given affiliation for a limited period of 3 years. After completion of 3 years institution applied for permanent affiliation and the same was rejected. The SC held that the refusal is purely on illusory grounds without considering the recommendation of the education commission and university authorities and the direct consequence of the same would destroy the very existence of institution and hence violative of Art. 30.
- **The Managing Committee of Moulana Abdul Kalam Azad Primary Teachers Education College v. State of Bihar** AIR 1989 Pat. 29: It is held that the minority institution status cant be claimed at particular point of time to seek benefits of Art.29 & 30. Minority Institution must establish that it is a minority institution in spirit and form and not just as a commercial venture.
- **All Ameen Educational Society; Hazrat Madarasa Education Society; Evershine Educational Trust; Jain Mahila Mandal; Sarabeshwar Vidhyapeetha v.**

**State of Karnataka** ILR 1989 Kar. 2715

The State Govt. policy decision that no new teachers training institution at any level should be sanctioned till the end of 7<sup>th</sup> plan was held to be constitutional on the ground that the state has to perform balancing at while considering the requirements of minority group for recognition / affiliation.

## 6. Applicability of Labour Legislations to Minority Institutions:

- **Christian Medical College Hospital Employees' Union and Another v. Christian Medical College, Vellore Association and Others** AIR 1988 SC 37: It has been held that the Labour Legislations have to be applied to every work man irrespective of character of the management. The Management of the Minority Institution has to respect and implement the social welfare legislations, otherwise, there is a likelihood of maladministration.

## 7. Art. 30(1) Read with Art. 29(2) Regarding Unaided and Aided Minority Institutions:

- **Sheetansu Srivastava v. Principal, Allahabad Agricultural Institute, Allahabad** AIR 1989 All. 117: It is held that the Govt. Aided Minority Institutions cannot preclude majority students by reserving seats for their own community in purported exercise of power U/Art. 30(1). Arts. 29(2) & 30(1) must be read together. A minority institution cannot insist on reserving seats for students of its own community.
- **T.M.A. Pai Foundation v. State of Karnataka** AIR 2003 SC 355:

*In conformity  
with existing law.*

The SC has held that the Govt. and the Universities cannot regulate admission policies of the unaided educational institutions run by the minorities. However, the Govt. can fix academic qualifications for teachers and other staffs to maintained academic standards. It is further held that an aided minority institution is entitled to have right to admission of students belonging to minority groups and at the same time required to admit non minority students also so that right U/Art.30(1) is protected and citizens right U/Art.29(2) are not infringed. The minority institution are free to have their own procedure and method for admission. But the procedure must be fair and transparent and the selection for professional and higher education courses should be on the basis of merit. With respect

to charging of fees it is held that an unaided educational institution cannot be regulated by the Govt. in determining the fees and at the same time the institution should not charge capitation fees. The character of the minority status of an institution has to be determined by considering the state as a unit and not country as a whole.

➤ **Islamic Academy of Education & Another v. State of Karnataka & Others** (2003)6 SCC 697:

The SC while interpreting the judgment in *Pai Foundation* case held that each minority institution is entitled to fix fees but the fixing of fees is subject to non profit and no capitation fees. It is observed that the factors determining the fees structure will be (a) Infrastructure and facilities (b) Investments made (c) Salaries of staff (d) Future plans of expansion and betterment. It is also held that the unaided professional institutions have full autonomy in their administration, but the Principle of merit cannot be sacrificed in the national interest. The Court also held that state can provide for reservation to financially and socially backward sections. The allotment of seats under different quotas has to be made by the state in accordance with local needs and interests.

➤ **P.A. Inamdar & Others v. State of Maharashtra & Others** AIR 2005 SC 3226 :

It is held that right to establish and administer educational institution involves (a) to admit students (b) to setup reasonable fee structure (c) to constitute governing body (d) to appoint staff (e) to take action if there is dereliction of duty by the employee. The Court further observed that the conditions imposed on an institution receiving grant must be related to proper utilization of grant and fulfillment of objectives of grant without diluting minority status of educational institution. It is further observed that neither in *Pai* case nor in Kerala Education Bill, there is any thing which would allow the state to regulate or control admissions in unaided professional education institution. Hence it is held that such

imposition of quota in unaided professional institution is encroachment on right and autonomy of private professional educational institution. The unaided E.I. can have their own admissions in a fair, transparent, non exploitative and based on merit. Every institution is free to device its own fee structure subject to limitation that there can be no profiteering and no capitation fee can be charged directly or indirectly.

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## **REPORT OF THE WORKING GROUP ON LEGAL EDUCATION**

### **Background**

1. The National Knowledge Commission ("NKC") was established by the Prime Minister of India in 2005 to recommend and undertake reforms in order to make India a knowledge-based economy and society. An important constituent of the NKC's functions is professional education, particularly in the field of legal education. In light of its significance, the NKC constituted a Working Group on legal education in the country. The members nominated by the Chairperson of the NKC, Mr. Sam Pitroda, to the Working Group are Justice Jagannadha Rao (Chair), Justice Leila Seth, Dr. Madhav Menon, Dr. B.S. Chimni, Dr. Mohan Gopal, Mr. P.P. Rao and Mr. Nishith Desai.
2. The Terms of Reference of the Working Group are as follows:
  - a. Identify constraints, problems and challenges relating to curriculum, teaching, infrastructure, administration and access.
  - b. Recommend changes and reforms to address the problems and challenges relating to curriculum, teaching, infrastructure, administration, and access.
  - c. Explore methods of attracting and retaining talented faculty members.
  - d. Suggest measures to develop a research tradition in faculties of law and law schools.
  - e. Suggest innovative means of raising standards and promoting excellence in legal education situated in the wider social context.
  - f. Suggest ways of incorporating emerging fields of legal education in teaching and curricula.
  - g. Identify problems implicit in regulatory structures that constrain the quality and spread of legal education.
  - h. Examine any other issue that may be relevant in this context.
3. The Working Group met on the following dates: September 24, 2006. October 5, 2006, November 12, 2006, January 15, 2007 and January 30, 2007
4. The members of the Working Group circulated several notes for discussion and minutes of the meetings were prepared at the end of each meeting and circulated. The various aspects covered by the Terms of Reference were discussed in detail and it was

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found that some of these aspects overlap each other. Therefore the Working Group has identified the following topics of importance in the matter of legal education:

**I. Vision and goals of legal education-status today, roadmap and broad strategy to reach those goals**

- a. At least one centre of legal excellence in every state
- b. Broad based content and scope of legal education in the context of constitutional goals
- c. Restructuring governance of legal education system accordingly
- d. Regional and Advanced Centers of legal research excellence to advance policy development/teacher training/generating new knowledge

**II. Content and Scope of legal education (Multi disciplinary and based in social context)**

- a. Curriculum planning and development —
- b. Teaching materials —
- c. Teaching/learning methods —
- d. Skills education/training with emphasis on experiential learning —
- e. Ethics/values for multiple roles —
- f. Examination —
- g. Legal knowledge management through legal education grid through Information and Communication Technologies ("ICT") and distance learning

**III. Governance Structure**

- a. Strict and professional control for quality
- b. Selection and service conditions
- c. Academic freedom
- d. Admission norms-procedures/access-needs blind; need fulfilled admissions
- e. Financing legal education-state financing for meritorious students/deserving colleges in rural areas;
- f. Accreditation, monitoring, accountability

**IV. At least four independent research centers to be funded by the central government with investment of Rs. 100 crores each and the following objectives:**

- a. Social justice promotion/judicial policy
- b. Processual justice for better justice delivery
- c. Dissemination of new knowledge/journals
- d. Research methodology including empirical methods
- e. Integration of research based learning
- f. Judicial/court/legal aid administration/management
- g. Alternative Dispute Resolution ("ADR")/conflict resolution

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- h. International law/comparative /globalization
- i. Shaping systemic legal change including indigenous traditions
- j. Teacher training-library development/continuity education

**V. Access, finance, infrastructure and management**

- a. Support to students admitted on merit (loans and scholarships)
  - b. Ensuring every law school admitting 100 students annually has the resources to meet an annual expenditure of Rs. 5 crores
  - c. Representation of bar, bench, academia and students in management
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**Chapter I**

**Vision and Goals**

**1.1** Some key statistics on legal education are pertinent towards the understanding the state of legal education in India today<sup>1</sup>.

a. Total number of students admitted for legal education every year for 2000-01: 63,381 (latest figures not available)

b. Total number of law graduates admitted to the bar every year in

- 2002: 28,268

- 2003: 33,657

- 2004: 46,438

(Figures for 2005 and 2006 not available)

c. Total number of institutions (all inclusive) teaching law as on October 31, 2006: 750

d. Total number of Government institutions: 153

e. Total number of Private institutions: 586

f. Total number of National Law School Universities ("NLSU") as on October 31, 2006: 11

g. Total number of students admitted to the NLSUs in 2006: 936

**1.2** The main challenge facing India's legal and judicial system is ensuring that common people in India are able to enjoy their constitutional and legislative rights to the fullest extent. The legal system should also effectively facilitate eradication of poverty as well as equitable and environmentally sustainable economic growth.

**1.2.1** To this end, legal education should aim to prepare legal professionals who will

play a decisive leadership role in meeting these challenges, not only as advocates practising in courts, but also as legislators, judges, policy makers, public officials and civil society activists as well as legal counsel in the private sector. Legal education should also prepare lawyers to meet the new challenges of working in a

globalized knowledge economy in which the nature and organization of law and legal practice are undergoing a paradigm shift. Original and path breaking legal research is needed to create new legal knowledge and legal ideas that will help us

1 Bar Council of India statistics, as stated in a letter dated January 13, 2007, to the NKC

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to meet these challenges in a manner responsive to the needs of the country and the ideals and goals of our Constitution.

1.2.2 The Working Group is of the opinion that the vision of legal education is to ensure justice oriented legal education to contribute to the realization of values enshrined in the Constitution of India. Legal education must also inculcate the need to observe the highest standards of professional ethics and a spirit of public service. In order to achieve these goals legal education needs to be broad based, multi disciplinary, multi functional and contextual. The phenomenon of globalization provides an important context in relation to which the vision and goals of legal education have to be concretized.

1.2.3 An important aim of legal education is also to meet the growing demands of the

legal services market without undermining the public service character of the law school/university. Legal education must cater to a wider audience than only provide personnel for the purposes of the administration of justice in courts. The new developmental agenda needs knowledge of international practices and transcends the established view that the purpose of legal education is only to generate practising lawyers.

The aim of legal education also should be to create lawyers who are comfortable and skilled in 'dealing' with the differing legal systems and cultures that make up our global community while remaining strong in one's own national legal system.

1.3 A number of law schools have been offering quality legal education. However, the most immediate challenge is to improve the quality of legal education in a vast majority of law schools in the country. This task entails a range of measures including reforms in the existing regulatory structure, significant focus on curriculum development keeping in mind contemporary demands for legal services, recruitment of competent and committed faculty, establishing research and training centers, necessary financial support from the State, and creating necessary infrastructure, especially a well endowed library.

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## Chapter II

### Content and scope of legal education in a multi disciplinary context

## 2.1 Admissions

2.1.1 In order to improve the quality of legal education, certain minimum conditions for admission to law schools and universities need to be agreed upon. Some NLSUs have agreed to conduct a common entrance test (CET). Consideration may be given to including other law schools and universities in the CET network. A single common entrance test for both three year and five year LL.B. programs may be devised. For the purposes of admission, including appearing in CET, a minimum percentage of forty five marks in the class 12/ graduation examination may be considered. Law schools may however be permitted to set a higher minimum percentage. Once the CET model extends to a large number of law schools, consideration may be given to prescribing a requirement that a candidate secure a minimum percentage of forty five in the CET for admission.

## 2.2. Curriculum Development

2.2.1 In order to realize the stated vision and goals of legal education, the curricula and syllabi need to be based in a wider body of social science knowledge. An understanding of the newer areas of law also requires some familiarity with developments in science and technology in addition to other rapidly developing sectors.

2.2.2 Curriculum development *inter alia* involves revisiting the distinction between core/compulsory and optional courses, considering the need to expand the domain of optional courses, rethinking the syllabus of individual courses, and developing innovative pedagogic methods.

2.2.3 At present, the Bar Council of India (BCI) prescribes a certain number of core courses, essentially leaving it to the law school to identify the optional courses to be offered (although the BCI mentions a few). In many NLSUs up to 40 to 50 optional courses are offered. This development may be usefully extended to the other law schools. For the present, each law school may be required to offer a minimum of twenty five optional courses. However, autonomy may be given to NLSUs and to the universities, which teach law in the university colleges and to which the private law colleges are affiliated, to decide the core and optional courses to be offered. It is suggested that the percentage of concentration should be as follows: 50% core courses (including legal research and clinic courses) and 50% optional courses.

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2.2.4 The syllabi of law courses have to be carefully designed. They must respect the

multidisciplinary character of legal education. In this regard, there is a need to keep in view the developments in social and natural sciences. In order to sensitize the law student to the values enshrined in the Constitution of India, it is important to mainstream human rights law. With the advent of globalization, it has become increasingly important to include international and comparative law perspectives.

2.2.5 Modules on issues such as globalization, environmental concerns, new technology, shifting government policies, trade trends, corporate movements, new and prevailing foreign investment avenues and changing labor and employment policies, to mention a few, should be included in the curriculum so that the graduating generation of lawyers can swiftly relate to the real world for the optimum application of legal services. This interweaving of law with the related issues of the contemporary world will add immense value to the law degree.

2.2.6 Legal education must equip the student with the necessary theoretical and practical skills to deal with the diverse and expanding world of legal practice. For example, the law graduate must be able to deal with and respond to a range of complex legal issues and problems, even as he or she chooses to specialize in a particular area of law; he must possess basic “legal” skills including negotiation, advocacy, drafting, counseling and research skills; the law graduate must be in a position to identify, analyze, and synthesize a vast array of legal materials and present it in a concise and logical manner; he must be sufficiently acquainted with the procedural aspects of the legal system so as to be in a position to give practical advice to clients; he must be trained to respond to new/novel problems that call for practical solutions; he must be able to contribute creatively to the range of social problems and challenges that face the nation; he must be trained to research independently so that he/she can contribute to the total pool of legal ideas through research publications; he must be able to read and analyze judicial decisions that are typically long, verbose, complex and difficult to understand, and should possess an ability to skim through passages, understand the relationship between the parts of the passage and also read between the lines — all of which are integral to a lawyer's tasks; he must also be grounded in ethical issues governing the legal profession. In order to imbibe the theoretical and practical skills, the syllabus of individual courses may be framed in consultation with practitioners, including members of the bar, the judiciary, industry and civil society.

2.2.7 To impart these skills a combination of various teaching methods including lectures, the case-study method, and problem oriented exercises are required. Imaginative pedagogic methods including field surveys and visits, simulated legal environments, and legal aid clinics may be used. Consideration may be given to evolving a transnational curriculum to be taught jointly by a global faculty through video conferencing and internet modes.

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## 2.3 Reading Material

2.3.1 An important aspect of curriculum development is the identification of appropriate reading materials, both essential and advanced. Study materials must include a range of readings including social science, science and technology, comparative and international, and human rights material.

2.3.2 The objectives of mainstreaming social sciences literature, human rights law, business law and international and comparative law is to be met. It is recommended that a committee or committees be formed at the law school level that include practitioners, social science faculty, and teachers of human rights law to discuss the syllabus and reading materials of all core and optional courses. It would be helpful in this regard to seek student feedback to understand the deficiencies in the structure and readings of courses offered at present. Thought may be given to setting up an all India Working Group to devise a "model" syllabus for all core and optional courses. The law schools would be free to use and depart from the "model" syllabus.

2.3.3 So far as professional ethics is concerned, the study material for the course must

consist not only of readings that familiarize the student with the basics of professional ethics but also a number of relevant orders passed by the BCI, the State Bar Councils and judgments of the High Courts and the Supreme Court, in which punishments have been awarded for professional misconduct.

## 2.4 Clinics

2.4.1 There is an urgent need to revisit and redesign the Clinic Courses. At present, these courses often tend to be soft courses in which a bit of relationship between theory and practice is dealt with (e.g., through some exposure to forensic sciences). There is a need to modernize clinic courses through introducing new areas of law: for example, specialized areas of contract law, Intellectual Property Rights ("IPR") laws, corporate law, etc. may be the subject of clinic courses. There is a need to recruit specialized faculty for the purpose.

## 2.5 Examination System

2.5.1 The task of curriculum development also includes the designing of appropriate

framework for evaluating students. The simple end-of-the year examination or end semester examination does not encourage necessary analytical, writing and communication skills. Many NLSUs have introduced the idea of project papers, project and subject viva, along with an end semester examination. The different components help develop the ability to carry out independent research and the ability to write and critically evaluate appropriate legal materials. The end semester examination should be problem-oriented and not a system that tests

memory.

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2.5.2 The credit system of evaluation may be introduced to replace the marks system.

Various heads could be given a certain credit value, both course-wise and activity-wise (e.g. participation in Moot Courts, representing the institution in competitive activity related to legal education, joining Legal Aid camps, internships with law firms, research projects, etc).

## **2.6 Internship**

2.6.1 The internship program is a critical element of professional legal education as it

allows practical learning in real world settings from peers. The internship program that presently exists in many NLSUs needs to be extended to all other law schools i.e., where it does not presently exist. In many NLSUs students have to intern every summer. Over the period of five years a student in a particular NLSU interns with NGOs, trial courts, appellate courts, law firms and corporate firms. While it may not be easy for students of all law schools to get placement in the chambers of Senior Counsel in the trial and appellate courts, or in law firms and corporate houses, or in NGOs, some amount of internship is absolutely necessary to prepare a graduate for the world of law practice. The BCI and the State Bar Councils could play a catalytic role in facilitating the internship programs.

2.6.2 The internship program, where it exists can be strengthened through rethinking

the period of internship and the need for some amount of structuring through discussions with the bar, judiciary, law firms, corporate houses and NGOs. There is in other words some need for standardization of the internship program to ensure that it does not become a mere ritual.

## **2.7 Mooting**

2.7.1 Mooting is an integral part of legal education. It helps a student hone his/her research and communication skills. It also allows a student to learn legal etiquette so necessary to all forms of legal practice. Therefore, periodic workshops should be held to acquaint the law student with different aspects of mooting. There should also be established formal procedures for selecting teams that represent the law schools in national and international moots.

## **2.8 Legal Aid**

2.8.1 Participation in legal aid programs should also be an integral part of legal education. It provides a crucial link between the esoteric world of law and the existential world of the ordinary citizen. The idea of holistic legal education would be somewhat incomplete unless a law student is acquainted with the

problems of ordinary people.

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## **2.9 Legal Knowledge Dissemination and Management**

2.9.1 For the maximum dissemination of legal knowledge across the country, the following may be considered: use of video conferencing of lectures of faculty (within India and outside), availability of computers to a large number of students, access to the Internet, networking the information available in the Indian Law Institute ("ILI"), Supreme Court Library, Indian Society for International Law ("ISIL") as well as those of universities and public institutions; availability of free and subscription based data bases. Translation of major legal texts may also be considered for wider dissemination.

## **2.10 LL.M**

2.10.1 There has been a steady decline in the quality of LL.M programs. In the NLSUs, the LL.M program is generally neglected although some have started to pay attention to it. There is a need not only to design appropriate courses, study materials, internship programs, systems of evaluation but also to encourage the development of skills necessary for classroom teaching for those wishing to join the academia. In the latter respect, Law Teaching courses may be introduced in the LL.M program so that those proposing to do LL.M are able to assess their inclination/ability for teaching in advance. The writing of a dissertation needs to be made mandatory as a part of the requirements of the LL.M program to develop and consolidate research, analytic and writing skills.

## **2.11 M. Phil and PhD**

2.11.1 Post graduates in law and the faculty members in law schools must be encouraged to undertake M.Phil and PhD research. Appropriate incentive schemes, on the lines of the current University Grants Commission ("UGC") scheme, may also be considered. There is need to improve the quality of the M.Phil and PhD courses. Towards this end, a course in research methodology may be made mandatory for all M.Phil and PhD students. A pre registration presentation also has to be introduced as a compulsory measure.

## **2.12 Measures to develop a research tradition in the legal field**

India, in keeping with its status as an emerging economic power must turn from being a simple consumer of knowledge to a producer of knowledge in order to identify and protect its national interests. India, in other words, needs to be proactive in advancing ideas and proposals in the world of law. For this to happen, law schools and universities need to provide leadership in the field of ideas. It entails much emphasis on research and publications through developing

the analytic, research and writing skills of law students. It also calls for encouraging faculty members to undertake research as an integral part of good teaching.

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2.12.1 The following measures are inter alia necessary for the development of a research

tradition in the field of law:

- Emphasizing analytic and writing skills in the LLB program;
- Teaching research methodology as an integral part of the LLB program: learning to formulate a research problem/question, assemble a bibliography, write a synopsis, and use footnotes.
- Creating excellent and research friendly library facilities to give students/faculty members easy access to latest materials and developments.
- Providing the faculty with access to computers and internet facilities, the latter being essential to overcome to some extent the lack of a good library.
- Rationalizing the teaching load so as to leave faculty members sufficient time for research.
- Granting sabbatical leave to faculty members to undertake intensive research. M.Phil and PhD degrees should be rewarded if these result in peer reviewed publications, either through additional increments (beyond the UGC scheme) or in any other appropriate manner.
- Institutionalizing faculty seminars as these create an environment in which ideas are given importance and the rigor of research tested
- Organizing periodic conferences on different law subjects with the idea of bringing out publications. Abstracts for such conferences should be invited and carefully chosen so as to ensure the quality of the end product
- Establishing quality peer-reviewed journals to act as an example for the desirable quality of publications.
- Prescribing research output as one of the criteria for the promotion of faculty members.
- Creating a database of citations so as to identify the most cited and influential writings and considering such data for promotion purposes.
- Setting up advanced centers for legal research. Four such regional centers may be established with a mandate for promoting research. (This issue has been dealt with separately in this report)

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### Chapter III

### Governance Structure

### 3. Standing Committee on Legal Education

3.1 The Report of the National Knowledge Commission envisages the constitution of a single regulator assisted by several standing committees, including a Standing Committee on Legal Education. Various aspects relating to the present status of Legal Education, the existing regulator, namely, the Bar Council of India (BCI), and constitution of a Standing Committee on Legal education are dealt with in this chapter.

3.2 Changes in legal education in the last fifty years show that the provisions of the Advocates Act, 1961 are no longer sufficient:

3.2.1 Under the Advocates Act, 1961 ("Act") the role allocated to the BCI was very limited in the sense that it was to promote legal education and to lay down minimum standards with a minimum standard necessary for those students who ultimately enter the legal profession to practice in the courts. The provisions of the Act did not envisage a larger role for the BCI.

3.2.2 The concept before and in 1961 was that law schools should mainly produce graduates for the purpose of entry into the bar. The Advocate's Act, 1961 was, therefore, enacted with that objective in mind by Parliament. According to the Supreme Court of India, in **O.N.Mohindroo -Vs- B.C.I.** (A.I.R. 1968 SC 888 = (1968)3 SCR 709); and **Bar Council of U.P.'s case** (AIR 1973 SC 231 = (1973) 1 SCC 261 = (1973) 2 SCR 1073) the subject covered by the Advocates Act, 1961 is referable to Entries 77, 78 in List I of Schedule VII of the Constitution of India. These two Entries deal, among others, with the subject:

"persons entitled to practice before the Supreme Court" (Entry 77) and "persons entitled to practice before the High Court" (Entry 78)".

3.2.3 Under section 7 (1) (h) of the Advocates Act, the BCI has been entrusted, as stated

above, with the limited role of "promoting legal education and laying down minimum standards of legal education" required for students who "are entitled to practice". Section 7 (1) (h) requires the BCI to "consult the universities for the purpose of laying down these standards of legal education". Section 7(1) (i) of the Act enables the BCI to grant recognition to universities whose law degrees shall be sufficient qualification for enrolment as an advocate. The BCI may, for this purpose, visit and inspect the universities concerned whose degrees in law may be recognized for the purpose of enrolment of law graduates as lawyers. Similar power is conferred by Section 6(1) (gg) of the Act on the State Bar Councils in *National Knowledge Commission Working Group on Legal Education*

regard to inspection. Section A of Part IV of the Rules made by the BCI deals with the five years' course, Section B deals with the three years' course and Section C deals with inspection.

### **3.3 Changed scenario**

3.3.1 About fifty years ago the concept was that the law schools are meant to produce

graduates who would mostly come to the bar, while a few may go into lawteaching.

The Advocates Act, 1961 was enacted to achieve the said object, namely, to prescribe minimum standards for entry into professional practice 'in the courts', as stated above. But during this period and more particularly after liberalization in the year 1991, the entire concept of legal education has changed. Today, legal education has to meet not only the requirements of the bar and the new needs of trade, commerce and industry but also the requirements of globalization. New subjects with international dimensions have come into legal education. There is also an enormous need for non practising law graduates in trade and commerce. It is also necessary to allow engineers, chartered Accountants, scientists and doctors to qualify in law for non practising purposes. Indeed, it is gratifying that some Indian Institute of Technology ("IIT") institutions have recently started several courses in law. The Open University system must also be allowed to cater to legal education. The Bar Council of India may, of course, still deal with the minimum standards of legal education for the purposes of entry into the bar but there is a need to have a new regulatory mechanism which will cater to the above mentioned present and future needs of the country.

3.3.2 Therefore, among the various types of legal education, we can identify the type

which is necessary for those who practice law, the type which prepares them to become researchers and teachers, the type which deals exclusively with academic subjects of substantive law, the type which deals with public legal education or para legal education, the type that prepares law graduates to deal with legal, regulatory and ethical issues in active sectors of domestic and international business and industry, and finally, the type which professionals in engineering, medicine, management and social work may require. It will be noticed that the Bar Council's role is confined to the first category only.

### **3.4 Bar Council of India has been conferred limited powers but is exercising more powers under subordinate legislation:**

3.4.1 In the light of the concept behind the Advocates Act, 1961, as stated above, very

limited powers were conferred on the BCI. But, during the last few decades, in as

much as there was no other regulator to take care of emerging needs and trends, the BCI has been dealing with all aspects of legal education under Resolutions, Rules and Regulations instead of limiting itself to the maintenance of minimum standards of legal education for the purpose of entry into the bar.

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3.4.2 In the 'First National Consultation Conference of Heads of Legal Education Institutions' held on 12.8.2002, it was pointed out as follows:

"The regulatory structure for legal education in India is currently seriously flawed and needs careful reconsideration. A typical law college has four masters at a minimum; the university to which it is affiliated; the State Government; the University Grants Commission; and the Bar Council of India..... These four agencies have varying mandates, interests and constituencies and do not provide coherent guidance for the improvement of legal education in the country"

It also stated:

"There is wide concern among legal academics that they are not adequately consulted currently by any of these authorities"

It was also clearly observed in the conference that the BCI had spread its jurisdiction beyond what was contemplated by Entries 77 and 78 of List I of Schedule VII of the Constitution and the provisions of the Advocates Act, 1961. The conference wanted that the BCI concern itself only with the minimum standards necessary for entry into the bar. It said:

"The Bar Council of India would then be responsible only for regulating entry into the legal profession and maintenance of professional standards rather than for legal education"

3.4.3 In the last three decades, as stated above, the BCI, by virtue of its Resolutions,

Rules and Regulations, has taken over the entire body of powers in relation to legal education which is not the intention of the Advocates Act, 1961, which is a legislation under Entries 77 and 78 of List I Schedule VII of the Constitution of India. The BCI, under its powers to grant recognition to universities for the purpose of enrolment of law graduates has been also dealing with inspections, affiliation or disaffiliation of various law colleges, granting annual affiliation or permanent affiliation etc... It has also been laying down conditions for establishment of law schools, buildings, appointment of faculty, and a variety of other matters in which the faculty and other players have not been allowed to have any effective role. These powers were extended by the BCI under Resolutions, Rules and Regulations, as stated above, though such extension is not permitted by the Advocates' Act, 1961.

3.4.4 While the statement of objects and reasons and the preamble of the University

Grants Commission Act, 1956 and of the Indian Medical Council Act, 1956 refer to the constitution of bodies for maintaining 'standards of education', there are no such words in the Statement of Objects and Reasons and the Preamble of the Advocates Act, 1961. The Act deals with minimum standards of legal education only in the context of 'practice in courts'. The Supreme Court of India has, in *National Knowledge Commission Working Group on Legal Education*

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fact, held that the UGC and the Medical Council of India ("MCI"), whose powers deal respectively, with all aspects of education or medical education, can lay down standards of education which will override any other law. See **State of MP Vs. Nivedita Jain** AIR 1981 SC 2045 = 1982(1) SCR 759 = (1981)4 SCC 296; **Premchand Jain Vs. R.K.Chhabra** AIR 1984 SC 981 = (1984) 2 SCR 883 = (1984) 2 SCC 302, **Osmania University Teachers Association Vs. State of AP**, AIR 1987 SC 2034 = (1987) 3 SCR 949 = (1987) 4 SCC 671, **University of Delhi Vs. Raj Singh** 1994 Suppl. (3) SCC 516 = AIR (1995) SC 336, **Medical Council of India Vs. State of Karnataka** 1998 (6) SCC 131 = AIR 1998 SC 2423; **Dr. Preethi Srivastava and Another v. State of M.P. and Others** (1999) 7 SCC 120 = AIR 1999 SC 2894. But such a general power to lay down standards of legal education for all purposes has not been conferred on the Bar Council of India by the Advocates Act, 1961.

3.4.5 As pointed out by Prof. Manik Sinha, Dean, Dr. RML Avadh University, in a well

written article titled 'Interference of Bar Council of India in Legal Education: Its Legality and Justifiability' (published in the volume, 'Legal Education in India in the 21st century, edited by Profs. A.K.Kaul and V.K.Ahuja, p 241), there appears to be considerable justification for treating the rules/resolutions/circulars of the Bar Council of India dated 2-7-96, 21-10-97, 23-9-98, 22-12-98 etc., made under way of delegated legislation, taking over maintenance of standards, curriculum, qualifications for admission and for faculty and inspections for all purposes, as being outside the scope of powers and jurisdiction of the Bar Council of India.

3.4.6 The members of the BCI who are practising lawyers and who get elected to the

Bar Council, do not all have expert knowledge or experience for deciding the requirements of legal education for purposes other than practice in the courts. Indeed, the Bar Council is not supposed to deal with all aspects of legal education. As pointed in **Sobhana Kumar vs. Mangalore University** (AIR 1985 Karnataka 223) by Rama Jois J (as he then was), the BCI can only prescribe minimum standards for entry into bar whereas the universities or the law colleges can

prescribe higher standards. (See also the 14th Report of the Law Commission, 1958 recommendation 25 is at page 550) and the 184th Report of the Law Commission, 2002 para 4.11). As the Advocates Act, 1961 is not intended to cover all aspects of legal education other than entry into the bar, the Rules, Circulars and Resolutions of the Bar Council of India in relation to all other aspects of legal education must be treated as beyond the scope of permissible delegated legislation and therefore invalid.

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### **3.5 There has not been effective consultation between the Bar Council of India and the Faculty**

3.5.1 Further, presently, there is no effective consultation with the faculty. In the Legal

Education Committee of the BCI constituted under Section 10 (2) (b) of the Act, there are 10 members out of whom five are lawyers- Bar Councilors, a retired Judge of the Supreme Court, a High Court Judge, the Law Secretary and the Secretary, University Grant Commission and there is only one faculty member. Of course, the Law Commission has recommended in the 184th Report (2002) that in the place of the two Secretaries, there could be two more members from the faculty. But, even that is not sufficient. There are more than 700 law schools in the country and it is a grave travesty of justice that the faculty has no equal role in the matter of legal education, whether it deals with entry into the Bar or with the general needs of society for legal services.

### **3.6 Permissions have been granted to several law schools of poor quality:**

3.6.1 The Report of the Ahmadi Committee (1994), constituted by the Chief Justice of

India and the various resolutions in other conferences have repeatedly pointed out that the BCI has granted permission to a large number of law schools which are maintaining very poor standards and have very poor infrastructure and several of these colleges are located in remote places, some times not even in the district head quarters. The faculty and library facilities in several of these law colleges are very much deficient. The inspections by the Bar Council's teams appear to have failed in their work. Only a few days ago, the Chief Justice of India observed in Patna that a small place like Junagadh in Gujarat has over thirty law colleges! There are several such situations across the country.

### **3.7 Most of the seven hundred odd law schools do not compare well with the standards and curriculum required in the present age**

3.7.1 While the NLSUs and some other law schools teach a very large number of subjects both compulsory and optional, which are necessary and useful for a variety of purposes in legal education, the other law schools offer only the

minimum number of compulsory subjects prescribed by the Bar Council of India. These other law schools are not able to offer more compulsory or optional subjects because of limited faculty. The NLSUs and few other law schools are offering a larger number of optional subjects, which in some institutions are more than 40. The faculty in these 700 odd law schools is limited because they are either large in number in one place or are located in remote areas in the mofussil where sometimes there is not even a District Court.

3.7.2 Today, we have about 11 NLSUs where students are selected in an all India competition. These colleges have been producing our best legal talent comparable to the most renowned colleges in U.S and U.K. However, this alone is *National Knowledge Commission Working Group on Legal Education*

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not sufficient for our purposes and we have to raise the standards of the remaining 700 odd law schools. The Law Commission has indeed observed in its 184th Report (2002) (see para 10.7) as follows:

“We cannot, however, rest content with a few star colleges. We must be concerned with all the rest of the hundreds of law colleges located in cities and district headquarters all over the country. It is these students who come to the bar in great numbers at the grass root level..... A few bright star colleges with limited number of student intake in an All India selection is not the end and may not result in an over all change in the level of legal education”.

3.7.3 Therefore, there is need to bring about a revolutionary change in the standards and

curriculum of these 700 and odd law schools so as to bring them, step by step, to the level required in the present age. In fact, it is necessary that all these law schools must be compelled to provide a large number of optional subjects.

3.7.4 A rating system based on a set of agreed criteria (e.g. facilities, course offered,

qualifications and experience of instructors, infrastructure, student selection system, salaries paid to teaching staff, etc) could be developed to gauge the standard of the law schools, and recognition could be either granted or withdrawn on the basis of such ratings. The rating result should be published both in hard copy and online, and should be reviewed on an annual basis.

**3.8 Needs of the bar and Subordinate Judiciary are not met by the graduates from the existing 700 and odd law schools:**

3.8.1 Recently, the Supreme Court of India has observed in **All India Judges Association Vs. Union of India** (2002) 3 SCALE 291 = (2002) 4 SCC 247, (2002) 2 SCR 712 = AIR 2002 SC 1752 that recruitment rules in the States should be amended to permit raw graduates from the law schools to enter the subordinate

judiciary. Obviously, this requires a high degree of proficiency from the students who pass from the law schools. It should be our objective to improve the standards of all the law schools to the standards required in the present age. Otherwise, the quality of the bar and the subordinate judiciary is bound to go down further. There is, in fact, an urgent need for a fresh probe into the quality of legal education in several law schools and if it is revealed that the standards are poor, it may be necessary to direct closure of such law schools.

3.8.2 Further, it has been noticed that in the last fifteen years, ever since the NLSUs

have been established, meritorious students both from NLSUs and some other law schools are joining law firms and corporate houses in greater numbers than those who opt for the bar and the subordinate judiciary. One of the objects of establishing the NLSUs was to improve the quality of the bar and the subordinate judiciary. While it cannot be disputed that such brilliant students are necessary for *National Knowledge Commission Working Group on Legal Education*

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leading law firms and corporate houses to meet the challenges of globalization, we should not forget that unless these students are attracted to the bar, subordinate judiciary and academia, the quality of legal services cannot be improved.

3.8.3 Senior Counsel in the Trial Courts, High Courts and the Supreme Court must be

generous in attracting this talent by offering them good compensation so that all of them may not get attracted to the law firms and corporate houses. As the pay scales of Junior Civil Judges have been enhanced after the implementation of the recommendations of the Jagannatha Shetty Commission, some of these students, if they join the subordinate judiciary at a young age, there are good chances of their reaching the High Court.

3.9 Bar Council of India ought to have taken steps to have legislation passed for

**re-introduction of the bar examination:**

3.9.1 As in all countries, in India too, a bar examination had to be passed whenever law

graduates sought enrolment as lawyers. Such an examination was being conducted by the State Bar Councils under the provisions of the Advocates Act, 1961 but the provision relating to bar examination was deleted by amendment of the statute in 1973. However, after the Ahmadi Committee Report (1994) recommended re-introduction of the bar examination, the requirement was reintroduced by a way of a Rule made by the Bar Council of India. The Supreme Court, in: 1999 (3) SCC 176 declared the Rule as *ultra vires* as **Sudheer Vs. Bar Council of India** such a requirement has to be introduced only by amending the

Advocates Act, 1961. The Supreme Court went further and made a clear recommendation that the requirement of bar examination must be reintroduced into the Act by a statutory amendment. Unfortunately, the BCI which is to take care of standards for purpose of entry into the bar has not taken steps to have the Act amended by reintroduction of the bar examination, in spite of the observations of the Supreme Court in **Sudheer** and in spite of the specific recommendation of the Law Commission in its 184th Report (2002) (Para 12.16).

3.9.2 From the above discussion, it is clear that the present quality of most of the 700

and odd law schools does not meet the domestic needs of our trade and commerce nor the needs for the purposes of recruitment to the subordinate judiciary. This quality should be improved by taking various steps such as bringing in better faculty and, better libraries. As stated above, the law schools must be compelled to offer a large number of optional subjects to meet the needs of the present times.

### **3.10 Challenge of delivering justice to the poor**

3.10.1 The main challenge facing India's legal and judicial systems is delivering justice

to poor people. For the most part, people deprived of Constitutional or legislative rights have little access to courts. With the cost of good quality legal services escalating, the ability of common people to get effective, high quality legal assistance and access to justice is diminishing and the legal system is in danger of  
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becoming further alienated from common people. New and innovative solutions are needed to ensure that common people have access to justice and that legal ideas and legal knowledge protect their interest. Increasing numbers of the best law graduates are moving to corporate law practice and civil and criminal litigation at the local level is suffering from a serious dearth of adequately qualified legal professionals. It is therefore imperative that legal education should prepare students with the aptitude, interest, commitment, skills and knowledge necessary to work with socially excluded people and the poor at the local level, to advance the cause of justice.

### **3.11 Domestic needs and needs of Globalization: Need for a new 'Regulator' with a global vision:**

3.11.1 We next come to the crucial issue of the needs of globalization. The Law Commission in its 184th Report, (2002) (Para 5.16) has pointed out that there are revolutionary changes which have come into legal education by reason of developments in information, communication, transport technologies, intellectual property, corporate law, cyber law, human rights, ADR, international business,

comparative taxation laws, space laws, environmental laws etc. and that "The very nature of law, legal institutions and law practice are in the midst of a paradigm shift".

3.11.2 The aim of transnational legal education is not to create individuals who can 'practice' law in a number of jurisdictions. Although graduates of such a program may well wish to do so, such ability should not be seen as an objective in itself, but merely as an incidental result. The aim of any new program should be to create lawyers who are comfortable and skilled in 'dealing' with the differing legal systems and cultures that make up our global community while remaining strong in one's own national legal system. Our lawyers must be trained to specialize in international trade practices, comparative law, conflict of laws, international human rights law, environmental law, gender justice, space law, biomedical

law, bio-ethics, international advocacy etc., They must also acquire a general knowledge of American, French, German, Chinese and Japanese law. For example, in South Korea, in the last 10 years, the curriculum has been expanded to include not only the above subjects, but also International Business, International Contracts, International Civil Procedure and laws of England, America, France and Germany.

3.11.3 Globalization does not merely mean addition or inclusion of new subjects in the

curriculum as stated above. While that is, no doubt, an important matter, the broader issue is to prepare the legal profession to handle the challenges of globalization. Prof. David E Van Zandt of North West University School of Law states in his article 'Globalization strategies for Legal Education' (2002, Vol.34 University of Toledo Law Review) as follows:

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"Any law dean worth his or her salt will tell alumni and students that it is important for their school to be 'international'.

..... As businesses become more global, CEOs increasingly bring in savvy general counsel who find and manage firms and lawyers who will do a great job no matter where in the world they are located. Businesses look for service providers whose practices are in line with the company's philosophy, regardless of nationality. We thus see a set of international conventions emerging with respect to the legal structuring of transactions and dispute resolution. The legal practices in capital market transactions have long been largely homogenized around the world, given the pressure of highly mobile capital.....

In terms of legal services, these changes have developed a standard set of

practices that lawyers use in dealing with the needs of significant business clients whose operations have international scope. Whether a lawyer is working for multinational clients in Hongkong, Frankfurt, London, Buenos Aires, or New York, the set of practices is largely the same. This enables a skilled lawyer to move effortlessly around the world.....”

This obviously goes far beyond preparing graduates only for practice at the bar or for the subordinate judiciary.

### **3.12 Steps which have to be taken to prepare legal education to meet various challenges, in addition to changes in curriculum:**

3.12.1 Apart from expanding the curriculum, law schools have to improve their libraries;

the students and faculty must be able to draw regularly from the internet. Use of computers and internet must be made compulsory in all law schools. So far as the faculty is concerned, experience in other countries shows that video-conferencing of lectures by foreign faculty can help in overcoming the shortage of teachers having knowledge of new subjects. The next thing that is being done elsewhere is the exchange of faculty for short periods, wherever finances permit.

3.12.2 Legal education must be socially engaged. This means that legal education programs must compulsorily expose students to the problems of poverty, social exclusion, social change and environmental degradation through clinical legal education, legal aid programs and through seminars and debates that sensitize and expose students to issues of social justice. Working with the poor through one or other program must become a mandatory part of the curriculum. Faculty must include individuals with inter-disciplinary training and direct experience on social issues.

3.12.3 In some countries, law schools are tying up or partnering with foreign law schools. For this purpose, an alliance of law schools has to be brought into being  
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so that the domestic as well as the foreign law schools may mutually benefit and, in such alliances, the cost is to be shared. The syllabi can be changed to have a common core of transnational curriculum. Block teaching allocations are also now common under which, both students and faculty listen directly to foreign faculty or to lectures by video-conferencing. Today, collaboration with foreign universities is resulting, in some countries, in award of two degrees simultaneously. (See the series of Articles by eminent Professors in Vol. 55 (2004) of the Journal of Legal Education pp.475 to 541)

3.12.4 Prof. Van Zanġt emphasizes the need for an international faculty, international

courses, exchange opportunities, international student infusion and summerabroad

programs so as to prepare students for global practice. He laments the conservatism of law schools in not moving into international dimensions due to lawyer regulation of legal education. He says:

“Despite these changes, law schools throughout the world have remained very traditional..... These features of lawyer regulation and education have combined to reduce innovation and create artificial shortages of lawyers, which in turn reduces the pressure from market forces .....

3.12.5 That exactly summarizes the position in India created by the existing regulator.

While Indian industry and businesses have expanded beyond national boundaries into other continents and while international business investments into India have come to stay, the bulk of our law schools operate in isolation and focus only on local needs and not even upon the needs of the nation, let alone regional or international needs. This situation that has been created can be broken only by establishing an independent regulatory mechanism with an international vision, which can see beyond the requirements of ‘entry into the bar’

**3.13 A new regulatory mechanism is needed with powers to deal with all aspects**

**of legal education:**

3.13.1 In the light of the changed scenario in the last fifty years, the needs of globalization after 1991, and the gaps and deficiencies in the existing system as referred to above which have to be filled up, it is clear that the BCI has neither the power under the Advocates Act, 1961 nor the expertise to meet the new challenges both domestically and internationally. It is, therefore, necessary to constitute a new regulatory mechanism with a vision both of social and international goals, to deal with all aspects of legal education and to cater to the needs of the present and the future. Such a mechanism will have to be vested with powers to deal with all aspects of legal education. However, the recommendations of the BCI in regard to maintenance of minimum standards for the purpose of ‘practice in courts’ will have to be binding on the new Regulator. The directives of the new Regulatory Mechanism must be treated as binding on the law schools, the Universities and on the Union and State Governments. The new regulator has to prevent dilution of the minimum standards by any of the

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players. For example, it has been reported recently that in some States, the Governments have passed orders reducing the minimum marks to be obtained at the common entrance examination for law to 35% or even below 35% in some cases, only with a view to enable all law schools in that State, most of which are substandard, to fill up all the remaining unfilled seats!

### 3.13.2 As stated at the outset, in the Report of the National Knowledge Commission

2006 released recently the proposal is to have an Independent Regulatory Authority for Higher Education (IRAHE) with several Standing Committees including one for legal education (vide page 55). It is also proposed that the following Acts namely those relating to UGC, All India Council for Technical Education ("AICTE"), MCI and BCI will have to be amended.

We, accordingly, propose the setting up of a Standing Committee on Legal Education whose recommendations will be taken into account by the new regulator, the IRAHE. The new Standing Committee on Legal Education may consist of a group of persons including eminent lawyers, members of the Bar Council of India, judges, jurists, academicians, eminent men from trade, commerce and industry, economists, eminent social workers, student representatives and others so that legal education can be revamped to meet the needs and challenges of all sections of society in the next five decades.

### 3.13.3 It is suggested that the new Standing Committee on Legal Education may consist

of 25 members as follows:

- a. One will be a retired judge of the Supreme Court and preferably the retired judge of the Supreme Court who is the Chairman of the Legal Education Committee of the Bar Council of India;
- b. Seven members from the legal profession of which five will be nominated by the Bar Council of India and two will be nominated by the IRAHE.
- c. Seven from the faculty;
- d. One from the government;
- e. Two to be nominated from the industry, trade and commerce;
- f. One from civil society;
- g. Two from other professions;
- h. One from management or other institutions having a legal component;
- i. One parliamentarian; and
- j. Two students of the final year, one representing the NLSUs and the other representing the other law schools (Non-voting representation).

All the members, except the five lawyers to be nominated by the Bar Council of India, have to be nominated by the IRAHE.

### 3.13.4 The BCI will continue to exercise its powers to recommend the minimum standards required for practice in the courts and such recommendations shall be

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binding on the IRAHE. Of course, the Bar Council of India will continue to enjoy its powers of discipline so far as the members of the bar are concerned.

3.13.5 The Standing Committee on Legal Education shall have authority to recommend to the IRAHE on the following matters:

- a. Laying down broad standards of legal education in all its aspects including standards for practice in the courts, provided that it shall enforce the minimum standards recommended by the Bar Council of India for the purpose of practice in the courts;
- b. Laying down conditions for admission of students and conduct of entrance examinations in each State and laying down the procedures of counseling and allocation of students to various law schools;
- c. Prescribing the curriculum, the syllabus, the number of compulsory and optional subjects and taking steps to provide for research;
- d. Qualifications and experience of law teachers and number of teaching hours;
- e. Establishment of training institutes for law teachers;
- f. Conditions for affiliation and recognition of law schools by the universities;
- g. Attendance requirements for students;
- h. Inspection of law schools and their accreditation;
- i. Ensuring autonomy for law schools so far as the optional subjects are concerned and prescribing regulations to prevent dilution of standards;
- j. Taking steps to improve the quality of legal education in all law schools to the standards of the NLSUs and to meet the challenges of the domestic needs and the needs of globalization

As already stated, the recommendations of the Standing Committee on Legal Education shall be considered by the IRAHE. The recommendations of the Bar Council of India under the Advocates Act, 1961 shall, however, be binding on the IRAHE insofar as they relate to minimum standards of legal education required for purposes of entry into the Bar.

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## **Chapter IV**

### **Centers for Advanced Legal Studies and Research (CALSAR)**

4.1 In the era of globalization, the production of ideas has assumed a critical role – both for social justice and for economic and technological advancement. If India has to fulfill its promise of becoming a global power it is crucial that we invest in knowledge production and the dissemination as well as make provision for adequate research. This is as true in the domain of law. The ongoing liberalization process raises complex issues relating to the nature of legal reforms necessary to ensure the development of all sections of the population. The growing harmonization of legal rules at the international level in different areas of economic and social life also poses its own challenges of determining our national

interests. The need to understand other legal traditions and cultures also require attention. If India has to fulfill its promise of becoming a global power it is crucial that we invest in knowledge production and dissemination as well as make provision for adequate research to address the range of issues and questions involved.

4.2 There is, therefore, an urgent need to set up four centers for advanced legal studies and research (CALSAR), one in each region. Such regional centers may be established using a base model with the mandate for promoting legal studies and research, and shall enjoy full autonomy. Some of the tasks to be assigned to these advanced legal centers would include cutting edge research on developing subjects and related areas, as well as serve as a think-tank for advising the government in national and international fora. Some of the specific functions and objectives of these centers would include the following:

- Bringing out a peer reviewed journal of international quality;
- Encouraging interaction across disciplines to facilitate a multi disciplinary approach to understanding law;
- Institutionalizing arrangements for having national and international scholars in residence;
- Organizing workshops and conferences on contemporary developments and issues of law;
- Undertaking in-depth research projects on new and developing areas of law, including specializing in some branches of law;

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- Providing continuing legal education for faculty members of law schools. All faculty members would be required to attend and clear minimum number of courses for promotion to professor grade;
- Courses / research subjects to include pedagogy, university management and administration, use of technology in legal education, etc;
- Building a world-class library, with up to date and easily accessible resources, including on-line resources and a national network’;
- Establishing a network with other international law research institutions to exchange information and access resources worldwide;

4.3 Each CALSAR would require an initial investment of around Rs. 50 crores (necessary for building an academic complex, conferencing facilities, library and other infrastructure). These institutes would also be provided with an annual budget to the tune of 5 crores (for salaries, fellowships, administrative expenses etc). The infrastructure should be of international standards. This initial

investment and the annual budgets should be borne by the central and respective State governments (that will host the CALSAR) respectively, but it should be financially self-sustaining.

Self-sustenance could be achieved in the following ways:

- Nominal fees could be charged for faculty training that could be levied on the faculty member's institution alone or could be shared with the faculty member.
- Paid training programs for the industry / profession to be conducted on the lines of executive training programs for business managers. The programs shall also be open for faculty members to ensure that training relevant for the industry is delivered to the academia as well.
- Lectures delivered to be recorded and sold in India and abroad.
- Government may tie-up with universities abroad for lectures to be transmitted to these universities through video conferencing for a price. These lectures may also be exchanged for lectures by faculty of leading universities.

4.4 Foreign scholars may be invited to these institutes for short term stays (from a semester to a year) to create a stimulating environment for serious research. These institutions would need to be provided with appropriate academic infrastructure that matches the best in the world (e.g. Max Planck Institutes in Germany).

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## **Chapter V**

### **Access, attracting, retaining talented faculty and financing of legal education**

#### **5.1 Access**

5.1.1 While the immediate task may be to improve the quality of legal education, the

question of access is an equally serious one. There is need to simultaneously address quality and access issues. There are three kinds of issues that need to be addressed here. First, there is the need for more law schools to meet the demands of an expanding legal services market. Second, there is the need to ensure the ready availability of loans and scholarships for needy students. Third, there are issues of access to a range of academic activities, such as mooting and participating in conferences that require financial support. Several law schools have successfully made arrangements with leading banks to facilitate the availability of loans to needy students. This practice can be emulated by other law schools. The legal community, especially members of the bar, should be requested to support a wide range of academic programs and activities in law schools.

#### **5.2 Explore methods of attracting and retaining talented faculty members.**

5.2.1 In order to attract and retain talented faculty members, there is an urgent need to

improve their remuneration and service conditions. The current UGC scales

offered by the law schools and universities are not sufficiently attractive. Second, the teaching load needs to be rationalized in order to leave sufficient time for research purposes. Third, there is need to institute both at national and institutional levels, awards to honor reputed law teachers and researchers. Fourth, there has to be sufficient flexibility with law schools to appoint law teachers without having an LL.M degree if the individual has proven academic or professional credentials. Fifth, there is a need to reconsider the existing promotional schemes and avenues in order to promote meritorious faculty members. Incentives such as fully paid sabbaticals should also be granted. Sixth, free faculty housing is another significant incentive that may be considered.

5.2.2 Faculty exchange programs with leading universities abroad would help in enriching the knowledge base and familiarizing faculty members with other legal systems and innovative pedagogic methods.

5.2.3 Video-conferencing of lectures by foreign faculty can help in overcoming the shortage of teachers with knowledge of new subjects. The next thing that is being done elsewhere is the exchange of faculty for short periods, wherever finances permit

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5.2.4 Young faculty members may be permitted to be associated with courts or law firms or corporate houses for brief periods of time in order to acquire practical knowledge. Appropriate infrastructure facilities to faculty, including the availability of computers, internet and access to online journals and legal databases may be considered.

### **5.3 Financing legal education**

5.3.1 It is estimated that a law school needs a minimum annual budget of Rs. 5 crores to

ensure adequate number of faculty members, a proper administrative staff, infrastructure facilities including a well endowed library, computer facilities, quality teaching materials, conference facilities, guest houses etc are available.

5.3.2 It is felt that it is the responsibility of the State for making adequate financial provisions. Unless the State finances legal education, it is difficult to ensure access to quality legal education at affordable costs. The alternative would be to evolve appropriate public private partnerships to finance legal education. Central and state ministries may also be urged to endow chairs on specialized branches of law. Such financing can be complemented with endowments from the private sector.

5.3.3 The latest innovation is acquisition of joint degrees by a student namely the degree of his own university as well as the degree of a foreign university with which there is a partnership during the same period. For example, in Puerto Rico

(Caribbean), in the last few years, dual degree programs have been started in conjunction with certain universities in Barcelona (Spain) and Minnesota (U.S.A.). To these graduates, the opportunities are unlimited. If we adopt such a system, the businesses and markets of our country can greatly benefit from the knowledge of such graduates.

5.3.4 Institutions must find ways to maximize infrastructure and resource utilization, such as, addition of more students, running separate morning and evening batches, and having spring and fall terms like in the U.S.

5.3.5 Infrastructure sharing – It is felt that there must be co-ordination between institutions for the purposes of sharing of infrastructure. Institutions with existing libraries, sport facilities, etc. can share these facilities with other institutions for a fixed fee. New institutions can develop facilities in such manner that facilitate sharing, for instance, an institution having more land may invest in sports facilities while the other may develop an excellent library.

5.3.6 Commercialize infrastructure - libraries may be opened to public access. Sports facilities, conference halls, etc. may be opened for public use at such time when they are not in use, for instance, in the evenings or during vacations.

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5.3.7 Lectures delivered by good faculty can be recorded and sold in India and abroad.

5.3.8 Tax holidays - Donations above a high minimum threshold to educational institutions by corporates could be granted tax exemption up to three-fourths of sum donated. Companies would be keen to associate their names to educational projects while availing tax benefits. In return it shall build the much-required initial point of contact between institutions and corporates that can be developed for further benefits. It shall also ensure that money percolates straight to the institutions rather than flowing from the tax-payer to the government to the institution, and being wasted in the process.

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The Working Group on legal education consisted of the following members:

1. Justice M. Jagannadha Rao (Chairperson)
2. Justice Leila Seth
3. Dr. Madhav Menon
4. Mr. P.P. Rao

5. Dr. B.S. Chimni

6. Mr. Nishith Desai

7. Dr. Mohan Gopal

As Chairperson and on behalf of all members of the said Working Group, I  
hereinunder

sign and deliver this report on legal education for the consideration of the National  
Knowledge Commission.

Regards,

Sincerely,

(Justice M. Jagannadha Rao)

March 5, 2007



# KUVEMPU UNIVERSITY

Office of the Director

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### TOPICS FOR INTERNAL ASSESSMENT ASSIGNMENTS 2007-08

Course : LL.M. ( Previous )

**Note:** Answer all **THREE** questions from **EACH PAPER** (25 MARKS for each Paper) Assignment must be written in the Internal Assignment Book, provided by the Directorate of Correspondence Courses. **ANSWERS** must be brief and where ever required answers must be substantiated with relevant Case Laws : Statutory Provision.

Students are advised to read the separate enclosed instructions, before beginning the writing assignments

#### Paper1: Law and Social Transformation in India

1. Social change connotes a far reaching change in the society arising from different types of group activities, from modified inter-personal and inter-class relationships and changed attitudes and approaches about governance, family and publicity, economic processes and social out look, as compared to their previous position - Elucidate 10 Marks
2. Examine the 'divisive' factors in society and the legal response to the same, in detail. 7½ Marks
3. Discuss 'Modernisation' as a value, as it is depicted in 'fundamental duties' and in the field of family law, agrarian reform and industrial reform. 7½ Marks

#### Paper 2: Indian Constitution : The New Challenges

1. Discuss the blanket immunity given to laws incorporated in the ninth schedule and Judicial review power of Supreme Court over the social laws. 7½ Marks
2. What non-legislative measure would you like to suggest for empowering women of India and how do build a legal regime for your proposal. 7½ Marks
3. Write Short Note on:
  - i) Rehabilitation of internally (National Projects) displaced persons.
  - ii) Stock taking of a decade experience of Panchayat Raj institutions of your district.
  - iii) Instances of Judicial Restraint in the history of Supreme Court of India.10 Marks

#### Paper 3: Judicial Process

1. Examine the varieties of Judicial and Juristic Activism. 7½ Marks
2. Discuss the concept of Dharma in Indian thought. 7½ Marks
3. Write Short Note on :
  - i) Judicial Process and Globalisation
  - ii) Theories of Justice
  - iii) Judicial Review10 Marks

#### Paper 4: Legal Education and Research Methodology

1. Critically examine the objectives of Legal Education and its Status in India
2. Explain the research design with respect to research problem.
3. Write short note on:
  - i) Legal Survey and Law reform
  - ii) Students participation in Law School program.

7½ Marks

7½ Marks

10 Marks

#### Paper 5: Doctrinal and Non-Doctrinal Research (Practical)

There is no Internal Assignment for Paper-05. Candidates are to prepare Two Dissertations one on Doctrinal and another on Non-Doctrinal mode respectively students are expected to follow the guidance given in the study guide lines on Paper V.

Students may select any relevant topic for the preparation of the Dissertation. The rationale behind this part of the course is to sharpen the Written. Communication skills and also to chanalise their thought process.

The Non-Doctrinal work may be Comprehensive case study/Emperical study/ Field study.

1. The student may choose any Topic of his/her choice relevant to the Syllabus for the purpose of the study. (Refer Chapter II of Practical Paper)

**The Dissertations must be in the following form :**

The information collected has to be presented in an organised and structural way. The design of the dissertation shall consist of

1. Introduction
2. Objectives of the Study
3. Methodology
4. Limitations
5. Core-Chapter-Evaluation
6. Findings and suggestion
7. Bibliography

Footnotes or Chapter notes is a must.

The subject matter organised as above has to be neatly typed or computerised and submitted in the hard bound form. The ideal size of the Dissertation may be in the range of 50 to 60 Pages.

**Submission of the Dissertation :**

One copy of each Dissertation (Doctrinal and Non-Doctrinal work) shall be submitted to *"The Director, Directorate of Correspondence Courses, Kuvempu University, Shankaraghatta – 577 451", on or before 31<sup>st</sup> July 2008 Dissertation received after due Date will not be considered for Valuation.*

#### Paper 6: The Law of Intellectual Property

1. Compare the position of Computer Software Protection in India UK USA and Europe
2. Narrate the stages of the procedure of patenting an invention and also draft a model for patenting an invention.
3. Write Short Note on:
  - i) Compulsory Licenses
  - ii) Failure OF GATT.
  - iii) WTO

7½ Marks

7½ Marks

10 Marks

**First Year LL.M (Business Law) Examination**  
**December - 2004**

**Paper I : Law and Social Transformation in India**

Time : 3 hrs]

[Max.Marks : 70

**Instructions :**

1. Answer All questions.
2. All questions carry *EQUAL* marks.
3. Answer should be supported by reference to the relevant statutory provisions and case laws, if any.
4. No clarifications can be sought on the question paper.  
In case of only ambiguity, students are expected to rely on the question paper as it is and respond to it.

1. a) Critically examine the relation between law and social change by referring to various approaches on the issue.

OR

- b) Discuss the jurisprudence of sarvodaya. Bring out the thoughts of Gandhiji and Jayaprakash Narayan on this subject.

2. a) Point out the essential features of secularism. How has it countered the problem of religion as a divisive factor?

OR

- b) Sketch the legal reforms brought in the field of criminal justice system and prisons.

3. a) Evaluate the language policy adopted in the constitution of India. What are the protections to linguistic minorities?

OR

- b) Give an outline of democratic decentralisation and local self government as a method of modernising social and political institution.

4. a) What are the legal responses to the problem of crimes against women? How far they are effective?

OR

- b) Discuss the legal measures against child labour and sexual exploitation of children.

Contd... 2

5. a) Write short notes on :

- i) Concept of India as one unit.
- ii) Alternative dispute resolution.

OR

b) Write short notes on :

- i) Caste as a factor to undo injustices.
- ii) Naxal movement.

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**First Year LL.M (Business Law) Examination  
December 2004**

**Paper III : Judicial Process**

Time : 3 hrs/

/Max.Marks : 70

**Instructions :**

1. Answer All questions.
2. Questions carry *EQUAL* marks.
3. Answer should be supported by reference to the relevant statutory provisions and case laws, if any.
4. No clarifications can be sought on the question paper.  
In case of only ambiguity, students are expected to rely on the question paper as it is and respond to it.

1. a) "For its realisation justice depends on law, however justice is not the same as law". Explain the utility of law in realisation to justice.

OR

- b) What is just law? Justice is dependence on social action and not on law? Evaluate.

2. a) What is the impact of public opinion on judicial process?

OR

- b) Explain the notion of 'Independence of Judiciary' and of 'Legal professions'.

3. a) Explain the theories of judicial process in the administration of justice.

OR

- b) What are the power of supreme court with respect to judicial review? Explain with decided cases.

4. a) What are the situation to be considered to explain judges as the makers of law.

OR

- b) Explain the foundations of Dharma.

Contd... 2

LMA003

5. a) Write short notes on :
- i) Shruthi and Smrithi
  - ii) Interpretation of statutes.

OR

- b) Write short notes on :
- i) Judicial review in India
  - ii) Influence of themes of justice in supreme court decisions.

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**First Year LL.M (Business Law) Examination**  
**December - 2004**

**Paper - IV : Legal Education & Research Methodology**

Time : 3 hrs]

[Max.Marks : 70

**Instructions :**

1. Answer All questions.
2. Questions carry *EQUAL* marks.
3. Answer should be supported by reference to the relevant statutory provisions and case laws, if any.
4. No clarifications can be sought on the question paper. In case of only ambiguity, students are expected to rely on the question paper as it is and respond to it.

1. a) Write a critique on the status of legal education in India.

OR

- b) Discuss the importance of discussion method in legal education and its suitability at the post graduate level.

2. a) "Organisation of seminars and publication of journals in law colleges enhances the quality of legal education". Elucidate.

OR

- b) "Legal aid programmes increase the opportunity to access to justice to the poor". Explain.

3. a) Discuss the importance of survey of literature in legal research.

OR

- b) Explain in brief the various tools and techniques used for the collection of data in empirical research.

4. a) Explain the importance of the use of historical and comparative research materials in legal research.

OR

- b) Explain the interview as a tool of research technique. Explain the characteristics which a person should possess to be a successful interviewer.

Contd... 2

5. a) Write short notes on :
- i) Lecture method of teaching
  - ii) Law reform

OR

- b) Write short notes on :
- i) Socio-legal research
  - ii) Jurimetrics.

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**First Year LL.M (Business Law) Examination**  
**December - 2004**

**Paper - VI : Law of Intellectual Property Rights**

Time : 3 hrs]

[Max.Marks : 70

**Instructions :**

1. Answer All questions.
2. Questions carry *EQUAL* marks.
3. Answer should be supported by reference to the relevant statutory provisions and case laws, if any.
4. No clarifications can be sought on the question paper. In case of only ambiguity, students are expected to rely on the question paper as it is and respond to it.

1. a) "There can be no copyright in an idea, subject matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work" - (AIR 1978 SC 1613) - Discuss the kinds and scope of copyrightable works.

OR

- b) Discuss the various rights conferred on the owner of copyrightable works.

2. a) The doctrine of fair use limits the scope of copyright monopoly in furtherance of its utilization objective' - Elucidate by examining the scope of fair use.

OR

- b) Examine the extent to which the performer is entitled to protection against unauthorised exploitations of his performance.

3. a) What are the basic requirements of patentability to be satisfied for products or processes to get patent protection? Refer is seminal judicial pronouncements.

OR

- b) Examine the procedure for obtaining patent in India.

Contd.... 2

4. a) Grant of compulsory license in a step in balancing the interest of public against the monopoly of patentee - Comment. Examine the circumstances leading to grant of compulsory license and the international dimension of compulsory licensing.

OR

- b) Discuss the controversies surrounding patenting of life forms.
5. a) Write short notes on :
- i) Assignment and licensing under copyright law
  - ii) Remedies for infringement of copyright

OR

- b) Write short notes on :
- i) Significance of patent cooperation treaty
  - ii) Protection of Farmer's rights.

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